Supreme Court, U.S.
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No. 02-___

IN THE

Supreme Court of the United States

LOUIS FREEH, *et al.*,
Petitioners,

v.

NOTRA TRULOCK, III, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under *Crawford-El v. Britton*, 523 U.S. 574 (1998), and its progeny, a court of appeals may reverse a district court's dismissal of a motive-based *Bivens* claim and infer an unconstitutional motive that overcomes the defendant government officials' qualified immunity where the complaint does not allege specific, non-conclusory facts to support plaintiffs' claim.

2. Whether, in order to state a First Amendment retaliation claim, plaintiffs must allege that the defendants' conduct has curtailed plaintiffs' allegedly protected speech.

PARTIES TO THE PROCEEDINGS

Petitioners Louis Freeh, Neil Gallagher, Steve Dillard, Brian Halpin, and Steve Carr are current and former employees of the Federal Bureau of Investigation. Petitioners were appellees before the Court of Appeals and defendants in the District Court.

Respondents Notra Trulock, III and Linda Conrad were appellants before the Court of Appeals and plaintiffs in the district court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

On September 22, 2000, the United States District Court for the Eastern District of Virginia (Honorable Albert V. Bryan, Jr.) entered an Order and Memorandum Opinion granting Petitioners' motion to dismiss the complaint. This opinion is unpublished, but is included in the attached Appendices ("App.") at 37a-42a. The December 28, 2001 opinion of the United States Court of Appeals for the Fourth Circuit, affirming in part, vacating in part, and remanding, is published at 275 F.3d 391 and is reprinted at App. 4a-36a. The April 18, 2002 Order of the Fourth Circuit denying Petitioners' motions for rehearing and rehearing *en banc* is published at 289 F.3d 829 and included at App. 1a-3a.

JURISDICTION

The Court of Appeals entered its opinion and judgment on December 28, 2001. The Court of Appeals denied rehearing and rehearing *en banc* on April 18, 2002. On July 9, 2002 and August 12, 2002, Petitioners sought and subsequently received extensions of time in which to file this petition from the Chief Justice, in his capacity as Circuit Justice for the Fourth Circuit. This petition is timely filed in accordance with the extension of time granted by the Chief Justice on August 15, 2002.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This case concerns an investigation by the Federal Bureau of Investigation ("FBI") into the possible possession and disclosure of classified information by Respondent Notra Trulock, III. The lower court opinions in this action—and the conflicts between them—raise important questions regarding the legal standards applicable to federal constitutional claims against government officials in their personal capacities, and the scope of the immunity afforded to the FBI agents and officials conducting the investigation at issue here.

Respondent Trulock is the former Director of the Office of Intelligence for the United States Department of Energy

("DOE"), serving in that capacity from 1994 to 1998. App. 48a. From 1995 to 1998, Trulock also served as Director of DOE's Office of Counterintelligence. *Id.* Respondent Linda Conrad was Trulock's Executive Assistant during these periods, and remains at DOE as the Executive Assistant to Trulock's successor and current Director of the Office of Intelligence, Lawrence Sanchez. App. 50a. At all times relevant to this action, Conrad and Trulock have lived together in Conrad's home. *Id.* In addition, they have shared the use of a personal computer owned by Conrad and located in Conrad's bedroom. *Id.*

Trulock alleges that, during his tenure at DOE, he uncovered evidence that Chinese spies had penetrated U.S. nuclear weapons laboratories and stolen the "know-how" to produce every weapon in the U.S. nuclear arsenal. App. 48a. Trulock claims to have reported this espionage to his superiors, who allegedly ignored or disregarded his reports. App. 49a. Trulock repeated his claims in testimony before Congress on multiple occasions in 1998. *Id.*

After leaving DOE, Trulock authored a "personal reflections-type" manuscript detailing his experiences at the agency. App. 49a. The manuscript addressed, *inter alia*, the alleged Chinese infiltration of U.S. nuclear weapons facilities, Trulock's investigation and reporting of the espionage, and the alleged mishandling of the "Chinese spy threat" by DOE, the FBI, and other sectors of the government. *Id.*

In the course of his DOE employment, Trulock had access to a wide array of classified information. Accordingly, before seeking publication of a "personal reflections-type" manuscript, drawn from his experiences at DOE, Trulock was required to and did submit the manuscript to DOE for security review. App. 5a. DOE, however, did not approve

publication.[1] Nevertheless, Trulock submitted at least a portion of the manuscript to the *National Review* magazine for review and publication. The magazine subsequently published an article, excerpted from Trulock's manuscript, in its July 31, 2000 issue. App. 49a.[2] Despite the publication date, Respondents allege that the article was "actually in circulation by early July 2000." *Id.* However, Respondents' complaint does not allege that Petitioners read the article at that time or that Petitioners were even aware of the article's contents by July 14, 2000—the date on which Petitioners' allegedly wrongful conduct occurred.

On the morning of July 14, 2000, Lawrence Sanchez, the new Director of DOE's Office of Intelligence and Conrad's supervisor, allegedly informed Conrad that the FBI wished to speak with her about Trulock. App. 50a. According to Conrad, Sanchez told her that the FBI had a warrant to search her home and that, if she refused to cooperate, the FBI would execute the warrant by breaking down her front door in the presence of the media. *Id.* The complaint, however, does not name Sanchez as a defendant and does not allege that Petitioners either directed Sanchez to make his comments to Conrad or even knew about his purported threat. 275 F.3d at 398; App. 12a.

Several hours later that day, Petitioners Halpin and Carr, both FBI agents, met with Conrad in a conference room at DOE. App. 38a. The two agents questioned Conrad about Trulock's manuscript and about Trulock's personal records

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[1] Although immaterial to the resolution of Petitioners' motion to dismiss, the parties dispute whether DOE refused to review the manuscript at all or, after review, affirmatively denied permission to publish it. App. 38a.

[2] Although the article itself is not part of the record, it has been (and is) publicly available, including on Westlaw. *See* Notra Trulock, *Energy Loss: What Happened to the Nation's Secrets*, NAT'L REV. (July 31, 2000), *available at* 2000 WL 11593852.

and computer files. App. 7a. Conrad informed the agents that she and Trulock shared a home, owned by Conrad, and that Trulock kept his files on a shared personal computer, located in Conrad's bedroom. App. 50a. Conrad then gave written consent for the agents to search both the home and the computer. App. 39a.

Halpin, Carr, and Conrad left DOE and proceeded to Conrad's house. Conrad drove herself in her own car, with agents Halpin and Carr following in a separate vehicle. App. 54a. Trulock was at Conrad's home when the three arrived. Trulock asked the agents if they had a warrant. App. 39a. The agents informed Trulock, in Conrad's presence, that they did not have a warrant, but that Conrad had consented to the search. *Id.* At no point did Conrad withdraw her consent. App. 7a.

The agents then executed their search and questioned Trulock regarding whether he had any classified materials in the home or on the computer. App. 55a. After examining the computer more closely, the agents elected to take the computer's hard drive with them. App. 39a. Before departing, the agents provided Respondents with a receipt for the hard drive and copied some of Conrad's and Trulock's personal records from the hard drive onto separate disks, which they gave to Conrad and Trulock, respectively. *Id.*

On July 31, 2000, the same day that the *National Review* article was published, Respondents Trulock and Conrad brought this *Bivens* action in the United States District Court for the Eastern District of Virginia, suing all Petitioners in their personal capacities. App. 45a-46a.[3] Respondents alleged that the interview of Conrad, the search of her home,

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[3] Under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), an individual may bring suit against a federal officer, in his or her individual capacity, for damages stemming from an alleged constitutional violation.

and the search and seizure of the shared computer's hard drive violated their Fourth Amendment rights. App. 60a. Separately and individually, Trulock claimed that these same actions, occurring on July 14, 2000, were taken in retaliation for the publication of his July 31, 2000 article and in violation of his First Amendment rights. App. 61a. Yet, Trulock failed to aver in the complaint that his speech—as reflected in the article—was entitled to First Amendment protection, that the FBI agents' alleged actions adversely affected his protected speech, or that the allegedly retaliatory conduct (*i.e.*, searching the home and computer and questioning him about his possession of classified materials), would not have occurred but for his claimed First Amendment activity. Moreover, while the complaint identified Petitioners Halpin and Carr as conducting the search and questioning, it failed to allege any direct involvement by Petitioners Freeh, Gallagher or Dillard with respect to any part of either the First Amendment or Fourth Amendment claims. *See, e.g.*, 275 F.3d at 402; App. 14a ("there is no allegation that any of these three individuals were personally complicit . . .").

The district court dismissed each of Respondents' claims against Petitioners. The court concluded that Conrad was never taken into custody, that her consent to the search was valid, and that, given this consent, Petitioners Halpin and Carr were justified in concluding that Conrad had authority to permit entry into the home and the searches. App. 41a. Accordingly, Respondents had failed to state a claim for the alleged Fourth Amendment violations, and Petitioners had qualified immunity for their actions. *Id.* In addition, the district court dismissed Trulock's First Amendment retaliation claim, finding that "other than the timing of the interrogation and search, the complaint presents no indication that the actions by the defendants were other than a good faith effort to determine whether classified information was being unlawfully possessed." App. 42a.

Respondents appealed to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed dismissal of the Fourth Amendment claims, concurring with the district court that Petitioners enjoyed qualified immunity. 275 F.3d at 403-04; App. 16a-17a. However, the Court of Appeals vacated the dismissal of Trulock's First Amendment claim. Despite his failure to plead the requisite elements of a retaliation claim, as well as the court's own assessment that "[w]hether Trulock's claim can survive a motion for summary judgment remains to be seen," the Fourth Circuit held that Trulock could proceed to discovery on his allegation that the agents' actions were animated by an improper motive. 275 F.3d at 405; App. 19a. The court concluded that the timing of the FBI's investigation of Trulock, the alleged absence of a criminal referral prior to the investigation, and the conduct of Conrad's supervisor combined to create an *inference* that the FBI acted with impermissible motives. 275 F.3d at 405; App. 20a. The court went on to conclude that Petitioners' qualified immunity, while dispositive of the Fourth Amendment claims, did not extend to protect Petitioners against Trulock's First Amendment allegation, even though both claims were based on the very same conduct, which the Court of Appeals concluded did not itself amount to an actionable constitutional violation. 275 F.3d at 405-06; App. 20a-21a.

Petitioners timely sought rehearing and rehearing *en banc* with the Court of Appeals, which denied both requests on April 18, 2002. Judge Widener dissented, concluding, *inter alia*, that factual determinations made by the panel majority were "entirely inconsistent with liability on a First Amendment claim of retaliation." 289 F.3d at 829; App. 2a. Noting his agreement with the district court's conclusion that the complaint was devoid of factual allegations to support a First Amendment retaliation claim, Judge Widener concluded that Petitioners were entitled to qualified immunity because their conduct was not clearly unlawful in the situation. 289 F.3d

at 830; App. 3a ("there is a legitimate question as to whether their conduct constituted a Constitutional violation"). This petition ensued.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for a writ of certiorari to: (1) ensure a correct statement and application of the pleading standards articulated by this Court—and disregarded by the Fourth Circuit—governing suits against federal officers, in their personal capacities, for damages stemming from alleged First Amendment violations; (2) ensure a correct statement and application of the qualified immunity standard in *Bivens* cases where unconstitutional motive is alleged; and (3) resolve the split among the Circuits regarding the necessary elements for a First Amendment retaliation claim. These issues are of utmost importance to the thousands of public officials constantly at risk of being sued and possibly being held liable individually for their official actions. Certiorari should be granted to address and clarify these important principles of federal law.

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN *CRAWFORD-EL v. BRITTON* REGARDING THE PLEADING REQUIREMENTS FOR SUITS AGAINST GOVERNMENT OFFICIALS.

The Court of Appeals abandoned the pleading requirements applicable to actions against federal officials in their personal capacities, as set forth by this Court in *Crawford-El v. Britton*, 523 U.S. 574 (1998). The Court of Appeals concluded that Respondents need not allege any factual basis for their First Amendment retaliation claim against the Petitioner FBI officials, but could instead proceed with their suit on the *mere inference* that a constitutional violation *may* have occurred. 275 F.3d at 405; App. 20a. In so doing, the

Court of Appeals not only failed to adhere to this Court's precedents, but also inappropriately substituted its judgment for that of the district court on a matter that this Court has recognized as uniquely within the district court's purview and expertise. *See Crawford-El*, 523 U.S. at 597-601. This Court should grant review to correct this error and to clarify the scope of *Crawford-El*'s requirements for actions against public officials in their personal capacity when they are sued on motive-based allegations, such as First Amendment retaliation.

This Court has long recognized a myriad of concerns raised by suits against government officials in their personal capacities. *See, e.g., Crawford-El*, 523 U.S. at 584-85, 590-91; *Harlow v. Fitzgerald*, 457 U.S. 800, 816-18 (1982). Such actions not only require the shouldering of the burdens and expenses of litigation, but carry heavy additional costs, such as "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from government service." *Harlow*, 457 U.S. at 816; *see also Scheuer v. Rhodes*, 416 U.S. 232, 239-40 (1974) ("the danger of the threat of such liability would deter [an official's] willingness to execute his office with the decisiveness and the judgment required by the public good").

These concerns are only magnified where, as here, Respondents allege that an otherwise permissible official activity (*i.e.*, an inquiry into the possession and disclosure of classified material) was motivated by an improper purpose (*i.e.*, to retaliate for exercise of a First Amendment right). By their very nature, such "motive" allegations are "easy to allege and hard to disprove." *Crawford-El*, 523 U.S. at 585. Indeed, as this Court has recognized, "allegations of subjective motivation might have been used to shield baseless lawsuits from summary judgment." *Id.* at 590. Absent summary disposition, the resulting "[j]udicial inquiry into subjective motivation ... may entail broad-ranging discovery and the deposing of numerous persons." *Harlow*, 457 U.S. at

817; *see also Crawford-El*, 523 U.S. at 585 ("insubstantial claims that turn on improper intent . . . implicate[] obvious concerns with the social costs of subjecting public officials to discovery and trial, as well as liability for damages"). In short, "[i]nquiries of this kind can be peculiarly disruptive of effective government." *Harlow*, 457 U.S. at 817.

Accordingly, in *Crawford-El*, this Court took up the "latest effort to address [this] potentially serious problem" and set forth a framework allowing the district courts to parse genuinely meritorious claims from baseless ones. *Crawford-El*, 523 U.S. at 584. Proceeding from the general proposition that "the trial court must exercise its discretion ... so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings," the *Crawford-El* decision made clear that:

> the plaintiff [must] put forward *specific, non-conclusory factual allegations* that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal.

Id. at 598 (quotations omitted) (emphasis added). Should plaintiffs fail to do so, "firm application of the Federal Rules of Civil Procedure is fully warranted" and the district court should dismiss the complaint. *Id.* at 597 (quoting *Harlow*, 457 U.S. at 819-20).[4] Significantly, "[i]t is the *district judges rather than appellate judges* . . . who have had the most

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[4] In *Crawford-El*, this Court observed that several of the policy factors addressed above "provide support for a procedural rule that makes it harder for any plaintiff, especially one whose constitutional claim requires proof of an improper motive, to survive a [dispositive] motion . . . ." *Crawford-El*, 523 U.S. at 591. Although the Court stopped short of accepting the D.C. Circuit's heightened pleading standard before it in that case, at least one Court of Appeals has determined that some form of a "heightened pleading standard" applies in improper motive cases following *Crawford-El*. *See Judge v. City of Lowell*, 160 F.3d 67, 73 (1st Cir. 1998).

experience in managing cases in which an official's intent is an element." *Id.* at 600 (emphasis added). Thus, affording the trial judge "broad discretion" in the management of such claims is the most "useful and equitable" approach. *Id.* at 601.

In this case, the district court executed its task to the letter. In analyzing the "specific, non-conclusory factual allegations" of Respondents' complaint, *Crawford-El*, 523 U.S. at 598, the district court concluded that no Fourth Amendment violation had occurred because "[t]here is no evidence that [Conrad's] will was so overborne as to render her consent invalid" and "[t]he complaint does not reveal a violation of clearly established law or that any violation of [Respondents'] rights occurred." App. 41a. With regard to the First Amendment claim at issue here, the district court concluded that "the complaint presents no indication that the actions by the defendants were other than a good faith effort to determine whether classified information was being unlawfully possessed." App. 42a. Accordingly, the district judge dismissed the action and spared Petitioners the "unnecessary and burdensome discovery or trial proceedings" that would accompany further proceedings on Respondents' claims. *Crawford-El*, 523 U.S. at 598.

The Court of Appeals properly affirmed the district court's decision on Respondents' Fourth Amendment claims, recognizing that the complaint failed to allege a constitutional violation that could overcome Petitioners' qualified immunity. 275 F.3d at 400-04; App. 10a-17a. However, the Fourth Circuit took a contrary and inconsistent approach to the First Amendment retaliation claim, improperly disregarding the district court's evaluation of this particular claim and vacating its dismissal, and thereby acting contrary to this Court's dictates. *See Crawford-El*, 523 U.S. at 600-01 (noting that "[i]t is the *district judges rather than appellate judges* . . . who have had the most experience in managing

cases in which an official's intent is an element" and that "broad discretion" should be afforded to district court judges in the management of such claims) (emphasis added).

Although the Court of Appeals recognized the infirmity of Respondents' complaint with respect to Trulock's First Amendment claim, noting that "[w]hether Trulock's claim can survive a motion for summary judgment remains to be seen," the Fourth Circuit nevertheless held that Trulock could proceed to discovery despite an utter lack of *any* specific, non-conclusory factual allegations in the complaint. 275 F.3d at 405; App. 19a. Likewise, the Court of Appeals failed to find that the complaint alleged *any* of the requisite elements for a First Amendment retaliation claim—*e.g.*, that Trulock's speech was entitled to First Amendment protection, that the FBI agents' alleged actions adversely affected that protected speech, or that the allegedly retaliatory conduct would not have occurred but for his claimed First Amendment activity. *See Crawford-El*, 523 U.S. at 593 (noting that a First Amendment retaliation claim is defeated by a showing that defendant would have engaged in the same complained-of conduct even in the absence of the protected activity); *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000) (listing elements of First Amendment retaliation claim).

Indeed, the complaint does not contain any such allegations. To the contrary, the complaint does not even allege that Petitioners read or were aware of the contents of the article when they acted. In fact, as the complaint plainly states, the article was not published until the day Respondents filed suit, several weeks after the questioning and search. *See* App. 49a.[5] Moreover, as the Fourth Circuit

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[5] Notably, the complaint does nothing to dispel the notion that the FBI's investigation of Trulock could have begun well before publication of the article, despite the obvious disconnect between the timing of the complained-of FBI conduct (July 14, 2000) and the actual publication date of Trulock's *National Review* article (July 31, 2000).

expressly recognized, the complaint fails to allege any direct involvement whatsoever by Petitioners Freeh, Gallagher or Dillard in any of the purportedly retaliatory conduct. *See* 275 F.3d at 402; App. 14a ("there is no allegation that any of these three individuals were personally complicit . . ."). Absent any of these such factual allegations, *Crawford-El* commands that the complaint be dismissed. *Crawford-El*, 523 U.S. at 598 ("the plaintiff [must] put forward *specific, non-conclusory factual allegations* that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal") (emphasis added).[6] Allowing the case to proceed now to discovery, with all the attendant costs and burdens that process entails, effectively denies Petitioners the immunity to which they are entitled, as

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[6] The Court of Appeals reversed solely on the basis of its conclusion that the timing of the FBI's investigation of Trulock, the absence of an allegedly necessary criminal referral prior to investigation, and the conduct of Conrad's supervisor created an *inference* of wrongdoing that overcame the lack of well-pleaded facts in the complaint. 275 F.3d at 405; App. 20a. Of course, permitting a "motive" case against government officials to proceed to discovery on a mere inference, without specific, non-conclusory factual allegations to support such a claim, raises precisely the same "serious problem" that *Crawford-El* sought to cure. *Crawford-El*, 523 U.S. at 584-85. Moreover, this inference is based on a "fact" (that a criminal referral is a necessary prerequisite to investigation) that is wrong as a matter of law. Pursuant to 28 U.S.C. § 535, no such referral is necessary. Even under the deferential standards applicable in a motion to dismiss, the Court of Appeals should not have resurrected Respondents' claim on the basis of a "factual" allegation that is wholly unsupportable. *See, e.g., Blackburn v. Fisk Univ.*, 443 F.2d 121, 123 (6th Cir. 1971) (in deciding motion to dismiss, court is not bound by "allegations that are clearly unsupported and unsupportable" or "in conflict with facts judicially known to the Court") (*cited by* 5A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 1357, at 318 (2d ed. 1990)). Likewise, resting its inference on the conduct of Conrad's supervisor is equally baseless. As the Court of Appeals noted, there is no allegation that the Petitioners directed or even were aware of Sanchez's conduct. 275 F.3d at 398; App. 12a.

this Court has recognized. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity is an "immunity from suit," not merely a defense to liability).

At worst, the decision of the Court of Appeals squarely conflicts with the precedent established by this Court in *Crawford-El v. Britton*, and the petition should be granted to correct this error. At best, the Court of Appeals' decision indicates confusion over the application of *Crawford-El*, and presents this Court with an opportunity to provide further guidance on what it has recognized as the "potentially serious problem" posed by improper motive suits against government officials. *Crawford-El*, 523 U.S. at 584. In either case, the petition should be granted to address this important area of federal law.[7]

II. THE COURT OF APPEALS MISAPPLIED THIS COURT'S DECISIONS ON QUALIFIED IMMUNITY.

In addition to abandoning the pleading requirements (and underlying policy concerns) articulated in *Crawford-El*, the Court of Appeals failed to adhere to this Court's standards in examining Petitioners' qualified immunity defense. Accordingly, the petition should be granted to correct this misapplication of the law of qualified immunity.

As the Court of Appeals correctly recognized, the doctrine of qualified immunity "protects law enforcement officers from bad guesses in gray areas and ensures that they are liable only for transgressing bright lines." 275 F.3d at 399; App. 9a (internal quotations omitted). In the words of this

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[7] Indeed, First Amendment retaliation claims in the *Bivens* and 42 U.S.C. § 1983 context are a recurring problem in this and the lower courts. A failure to resolve this case through a grant of the writ of certiorari will likely serve to undermine the Court's carefully crafted decision in *Crawford-El* and spawn confusion in the lower courts.

Court, immunity ensures "the vigorous and fearless performance" of law enforcement duties "essential to the proper functioning of the criminal justice system." *Imbler v. Pachtman*, 424 U.S. 409, 427-28 (1976).[8] Qualified immunity serves "the public interest . . . [in] actions taken 'with independence and without fear of consequences,'" *Harlow*, 457 U.S. at 891 (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)), and avoids "introduc[ing] an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment." *Owen v. City of Independence*, 445 U.S. 622, 655-56 (1980); *see also Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (observing that possible chilling effect would bring "substantial social costs").

This Court has explained that, in examining whether an official is entitled to qualified immunity, a court must first consider the threshold question of whether "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). If there is no violation of a constitutional right, "there is no necessity for further inquiries concerning qualified immunity." *Saucier*, 533 U.S. at 201. If, however, a constitutional violation can be demonstrated, "the next sequential step is to ask whether the right was clearly established." *Id.* This inquiry must be made within "*the specific context of the case*, not as a broad general proposition," and the relevant test of "whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 201-02 (emphasis added); *Wilson*, 526 U.S. at 615; *Anderson*, 483 U.S. at 640.

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[8] Although *Imbler* is a case involving 42 U.S.C. § 1983 and not *Bivens*, "the qualified immunity analysis is identical under either cause of action." *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

Here, the Court of Appeals departed from this authority and erred in going beyond the first inquiry. The Court of Appeals observed that a plaintiff asserting First Amendment retaliation must demonstrate: (1) protected speech; (2) the alleged retaliation adversely affected that speech; and (3) a causal connection between the protected speech and the retaliatory action. 275 F.3d at 404; App. 18a. The facts alleged in the complaint, however, are neither specific nor non-conclusory, and they are devoid of any support for a claim of First Amendment retaliation. Indeed, the *only* facts alleged in support of the retaliation claim are that Trulock's article was published on July 31, 2000, the article was "in circulation in early July,"[9] and the search occurred on July 14, 2000. App. 49a. No other facts are asserted that make any connection—causal or otherwise—between the article's publication, the Petitioners, and the search at issue. Rather, the reader must contort a claim of retaliation from nothing more than the timing of events. Inexplicably, the Court of Appeals did exactly that. Because these facts simply do not support a First Amendment retaliation claim, even when viewed in a light most favorable to Respondents, the court erred—as Judge Widener noted—in denying Petitioners' qualified immunity. 289 F.3d at 830; App 2a-3a.

Moreover, even if the Court of Appeals appropriately did move past the initial inquiry on qualified immunity, Petitioners are still entitled to that immunity because the complaint alleged no facts establishing that Petitioners' investigation was anything other than reasonable in light of clearly established law. *See Saucier*, 533 U.S. at 201. Indeed, it is remarkable that the Court of Appeals both

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[9] The Court of Appeals misstated the record in reporting that "[t]he article was published in early July." 275 F.3d at 405; App. 19a. In fact, the complaint alleges only that the article was published in the July 31, 2000 edition of *National Review*, and that it was "in circulation by early July 2000." App. 49a.

affirmed and reversed the district court on fundamentally the same basis: finding immunity appropriate for Respondents' Fourth Amendment claims, but not their First Amendment claim—even though both claims were based on the very same conduct. Petitioners could not possibly "have known that [their allegedly] retaliatory conduct was impermissible," 275 F.3d at 406; App. 20a, because, as the Fourth Circuit determined elsewhere in its opinion, that very conduct was permissible. 275 F.3d at 404; App. 17a.

Because the Court of Appeals failed to conform to this Court's precedents on these critically important issues of qualified immunity, the writ of certiorari should issue.

III. THE PETITION SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS ON AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW.

Finally, the Court of Appeals' decision presents this Court with a conflict among the federal Courts of Appeals regarding the necessary elements for a First Amendment retaliation claim. The Court should grant the petition in order to resolve the circuit split on this important issue of federal constitutional law.

In the case at bar, the Fourth Circuit held that, in order to sustain a First Amendment retaliation claim, a plaintiff must show "that the defendant's alleged retaliatory action adversely affected his constitutionally protected speech." 275 F.3d at 404; App. 18a (citing *Suarez*, 202 F.3d at 686). This viewpoint, while shared by the First, Second, and Fifth Circuits (*see Sullivan v. Carrick*, 888 F.2d 1, 4 (1st Cir. 1989); *Spear v. Town of West Hartford*, 954 F.2d 63, 67 (2d Cir. 1992); *Keenan v. Tejeda*, 290 F.3d 252, 259 (5th Cir. 2002)), is squarely in conflict with the holdings of the Sixth, Ninth, and Tenth Circuits. *See Bloch v. Ripar*, 156 F.3d 673, 681 (6th Cir. 1998); *Mendocino Envtl. Ctr. v. Mendocino*

County, 192 F.3d 1283, 1300 (9th Cir. 1999); *Smith v. Plati*, 258 F.3d 1167, 1176 (10th Cir. 2001). As the *Keenan* court observed earlier this year, the former group of appellate courts "requires some showing that the plaintiffs' exercise of free speech has been curtailed." *Keenan*, 290 F.3d at 259. The latter collection of Circuits does not. As a result, the standard for assessing the very same federal constitutional claim differs across jurisdictions, based on nothing more than the state in which the claim is asserted. The federal system cannot tolerate the situation in which the scope of federal constitutional rights depends solely upon geography.[10]

Accordingly, the Court should grant the petition to resolve this important issue of federal constitutional law and to ensure the uniform application of the First Amendment to retaliation claims brought throughout the country.

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[10] The Circuits are further split in cases such as this, where the sufficiency of the complaint is at issue. In the Fourth and Ninth Circuits, "[d]etermining whether a plaintiff's First Amendment rights were adversely affected by retaliatory conduct is a *fact-intensive inquiry* that focuses on the status of the speaker, the status of the retaliator, and the nature of the retaliatory acts." *Suarez Corp.*, 202 F.3d at 686 (emphasis added); *Mendocino County*, 192 F.3d at 1300. In these jurisdictions, courts will look behind the face of a retaliation complaint and are more apt to sustain claims challenged by a motion to dismiss. In contrast, the Courts of Appeals for the First and Second Circuits give short shrift to those First Amendment retaliation complaints that are "conclusory and speculative, . . . offer[ing] nothing beyond a bare assertion that the [retaliation] caused a chilling effect . . . ." *Spear*, 954 F.2d at 67 (internal quotation omitted); *Sullivan*, 888 F.2d at 4 ("Where a chilling effect is speculative or too remote, finding an abridgment of First Amendment rights is unfounded."). In these Circuits, such complaints "do[] not suffice to defeat a Rule 12(b)(6) motion." *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 13, 2002

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

[Filed: April 17, 2002]

No. 00-2260

NOTRA TRULOCK, III; Linda Conrad,
Plaintiffs-Appellants,

v.

LOUIS J. FREEH, in his personal capacity; Neil Gallagher, in his personal capacity; Steve Dillard, in his personal capacity; Brian Halpin, in his personal capacity; Steven Carr, in his personal capacity; Jane Doe, I, in her personal capacity,
Defendants-Appellees.

ORDER

The Court denies the petitions for rehearing and rehearing en banc.

Entered at the direction of Judge Michael for the Court.

WIDENER, *Circuit Judge, dissenting*:

I respectfully dissent from the denial of the defendants' petition for rehearing.

The panel's decision to remand for further examination of Trulock's First Amendment retaliation claim other than for trivial causes, is based wholly on statements made by Sanchez at the time of the search that:

> Sanchez told Conrad, on behalf of the FBI, that there was a search warrant when there was none. Finally, two weeks after the incident, Sanchez told Conrad that if she

> initiated a lawsuit, Sanchez, to protect the "Bureau," would deny telling Conrad that the FBI claimed to have a search warrant.

Trulock v. Freeh, 275 F.3d 391, 405 (4th Cir.2001).

And, earlier that day, when Conrad arrived at work

> Sanchez took her aside to say that the FBI wanted to question her about Trulock. Sanchez warned her that the agent had a warrant to search the townhouse and would break down the front door in the presence of the media, if she refused to cooperate. 275 F.3d at 398.

Sanchez, however, was not an employee of the FBI, rather of the Department of Energy. 275 F.3d at 398. He was not even sued. 275 F.3d at 391. The panel concluded as a fact, in examining the liability of Freeh, Gallagher and Dillard, all from the FBI, that:

> While the complaint alleges that Sanchez was speaking at the request of the FBI there is no allegation that any of these three individuals were personally complicit in Sanchez's alleged misrepresentations. 275 F.3d at 402.

Also in the panel decision is the finding with respect to the statement Sanchez made to Conrad at work

> Nor does the complaint allege that any of the five individual Defendants either directed Sanchez to make that threat or knew about it. 275 F.3d at 398.

These factual conclusions made by the panel and just quoted are, in my opinion, entirely inconsistent with liability on a First Amendment claim of retaliation.

With respect to the only two other items on which the panel based its remand other than the performance of

Sanchez, timing and engaging in the search without a criminal referral from the Department of Energy, the district court reasoned that

> Other than the timing of the interrogation and search, the complaint presents no allegations that the actions by the defendants were other than a good faith effort to determine whether classified information was being unlawfully possessed. 275 F.3d at 399.

In my opinion nothing in this record shows that the above quotation from the district court's decision was erroneous. Because, at the worst for the defendants, there is a legitimate question as to whether their conduct constituted a Constitutional violation, they are entitled to qualified immunity. *Wiley v. Doory,* 14 F.3d 993, 995 (4th Cir.1994).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 00-2260

NOTRA TRULOCK, III; Linda Conrad,
Plaintiffs-Appellants,

v.

LOUIS J. FREEH, in his personal capacity; Neil Gallagher, in his personal capacity; Steve Dillard, in his personal capacity; Brian Halpin, in his personal capacity; Steven Carr, in his personal capacity; Jane Doe, I, in her personal capacity,
Defendants-Appellees.

Argued May 7, 2001.
Decided Dec. 28, 2001.

Before MICHAEL and GREGORY, *Circuit Judges*, and BENSON EVERETT LEGG, *United States District Judge* for the District of Maryland, sitting by designation.

OPINION

LEGG, *District Judge*:

This case requires us to determine whether the Appellants' complaint, which the district court dismissed under FRCP 12(b)(6), alleges sufficient facts to proceed to discovery. We agree that their Fourth Amendment claims (count one), alleging an illegal interrogation and search of a townhouse and a computer, were properly dismissed, primarily on the basis of qualified immunity. We conclude, however, that the complaint sufficiently pleads a claim under the First

Amendment that the Defendants searched Trulock's home and computer in retaliation for a magazine article that Trulock wrote, criticizing the White House, the Federal Bureau of Investigation ("FBI") and other departments of the federal government. Accordingly, we reverse and remand the First Amendment claim (count two) for further proceedings.

I.

Notra Trulock served as the Director of the Office of Intelligence of the U.S. Department of Energy ("DOE") from 1994 to 1998. From 1995 to 1998, Trulock also served as the DOE's Director of the Office of Counterintelligence. Trulock alleges that he uncovered evidence that Chinese spies had systematically penetrated U.S. weapons laboratories, most significantly the Los Alamos Nuclear Laboratory. Trulock contends that the White House, the FBI, and the Central Intelligence Agency ("CIA") ignored his repeated warnings about the espionage. Congress eventually learned of the security breach and in 1998 invited Trulock to testify, which he did on several occasions. That same year, Trulock was demoted within the DOE; he was ultimately forced out in 1999.

In early 2000, Trulock wrote an account of his findings, which criticized the White House, the DOE, the FBI, and the CIA for turning a blind eye to the security breach. Trulock claims that the manuscript did not include any classified information. Nonetheless, in March of 2000, Trulock submitted the manuscript to the DOE for a security review, but the DOE declined to examine it. Afterward, Trulock sent the manuscript to the *National Review,* which published an excerpt in an edition that was circulated in early July of 2000. Although neither side placed the article in the record, the parties agree that it charged the administration with incompetence.

Plaintiff Linda Conrad has been the Executive Assistant to the Director of the Office of Intelligence at the DOE for more than six years. During Trulock's tenure she reported to him. Conrad now reports to Trulock's successor, Lawrence Sanchez. Trulock and Conrad live in a Falls Church, Virginia townhouse, which Conrad owns.

Conrad alleges that on the morning of July 14, 2000, when she arrived at work, Sanchez took her aside to say that the FBI wanted to question her about Trulock. Sanchez warned her that the agents had a warrant to search the townhouse and would break down the front door, in the presence of the media, if she refused to cooperate. Although the Plaintiffs allege that Sanchez made this statement to Conrad "on behalf of the FBI," the complaint does not recite a factual basis for this assertion. Nor does the complaint allege that any of the five individual Defendants either directed Sanchez to make the threat or knew about it.

Later that day, around 4:00 p.m., FBI Special Agents Brian Halpin and Steven Carr arrived at DOE headquarters and escorted Conrad to a conference room. Although the complaint states that they were armed, Conrad does not contend that the agents displayed their weapons, raised their voices, or otherwise threatened her during the three hour interview.

According to the complaint, Conrad was able to receive two incoming telephone calls, one of which was from Trulock, but that the agents "would not let [her] take either telephone call in private." (J.A. at 9.) The complaint further alleges that the agents refused to allow Conrad to make any outgoing calls. The complaint implies that Conrad was not at liberty to leave the conference room. When questioned on this point during oral argument, however, Conrad's attorney could not assert that she ever tried to leave the room (*e.g.*, to place a call in private) or that the agents told her that she was not free to terminate the interview and leave.

The agents queried Conrad about Trulock's personal records and computer files. Conrad responded that she shared a computer with Trulock, but that each of them maintained separate, password-protected files on the hard drive. Conrad and Trulock did not know each other's passwords and could not, therefore, access each other's private files, Conrad stated.

The agents questioned Conrad for about three hours. Towards the end of the interview, the agents gave Conrad a form, which they asked her to sign. The complaint alleges that the agents did not explain the form to Conrad and that Conrad did not read it, learning only afterwards that she had consented to a search of her house. The complaint does not allege that the agents claimed to have a search warrant, threatened to break down Conrad's door if she refused to sign, or mentioned the media. Conrad does maintain, however, that she was fearful, crying and shaking.

At the end of the questioning, the agents followed Conrad to her townhouse, where Trulock was waiting. When Trulock asked to see the search warrant, the agents responded that they had no warrant but that Conrad had consented to the search. The complaint does not contend that Conrad tried to withdraw her consent or that Trulock tried to bar the search on the ground that his consent, as a resident of the house, was also necessary.

The agents located the computer in the bedroom. Special Agent Carr and an unidentified FBI computer specialist (named in the complaint as Jane Doe I) searched the computer's files for about ninety minutes. The complaint alleges that Agent Carr looked at Trulock's password protected files. When the search was over, the specialist, after giving Conrad a receipt, took the hard drive away.

Two weeks later, Conrad and Trulock filed the instant *Bivens* suit.[1] Count one of the complaint, brought under the Fourth Amendment, alleges that: (i) the Defendants violated Conrad's rights by seizing her during the interview; (ii) the Defendants violated Conrad and Trulock's rights by coercing Conrad's consent to search their home; and (iii) that Conrad's consent, even if voluntary, was insufficient to permit the search of Trulock's private computer files. In count two, brought under the First Amendment, Trulock contends that the FBI conducted the search and seizure in direct retaliation for the unflattering magazine article.

Prior to discovery, the Defendants moved under Fed. R. Civ. P. 12(b)(6) to dismiss the complaint, arguing that it failed to state a constitutional violation either for unlawful search and seizure or for retaliation. Each Defendant also argued that he was entitled to qualified immunity on both counts. The district court granted Defendants' motion to dismiss, holding that the Defendants, having violated no clearly established law, were entitled to qualified immunity. With respect to Trulock's retaliation claim, the district court concluded that "other than the timing of the interrogation and search, the complaint presents no indications that the actions by the defendants were other than a good faith effort to determine whether classified information was being unlawfully possessed." (J.A. at 43.)

Because the district court granted Defendants' motion to dismiss, our review is *de novo*. *Stuart Circle Hospital Corp. v. Aetna Health Management*, 995 F.2d 500 (4th Cir.1993). Like the district court, we must assume all facts plead by Appellants to be true. *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir.1993).

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[1] Under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), an individual may bring a civil suit against a federal officer for damages stemming from a constitutional violation.

II.

Qualified immunity shields government officials from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). This immunity "protects law enforcement officers from 'bad guesses in gray areas' and ensures that they are liable only 'for transgressing bright lines.'" *Wilson v. Collins*, 141 F.3d 111, 114 (4th Cir.1998) (quoting *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir.1992)). Immunity applies to "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). Government officials performing a discretionary function are immune from liability for civil damages unless (i) the officers' conduct violates a federal statutory or constitutional right; (ii) the right was clearly established at the time of the conduct; and (iii) an objectively reasonable officer would have understood that the conduct violated that right. *Milstead v. Kibler*, 243 F.3d 157, 161 (4th Cir.2001) (citing *Wilson v. Layne*, 526 U.S. 603, 614-15, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999)).

The first step in analyzing whether qualified immunity exists is to determine whether the plaintiff has alleged a violation of a statutory or constitutional right. *Siegert v. Gilley*, 500 U.S. 226, 231, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 841 n. 5, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (noting that if courts were to rule on qualified immunity without determining the constitutionality of the challenged conduct, "standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals").

Next, the trial court must assess whether the right at issue was clearly established at the time of the breach. The court

should focus upon "the right [not] at its most general or abstract level, but at the level of its application to the specific conduct being challenged." *Wiley v. Doory*, 14 F.3d 993, 995 (4th Cir.1994) (internal quotations omitted) (quoting *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir.1992)); *see also Anderson v. Creighton*, 483 U.S. 635, 639-41, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right"). This does not mean, however, that an official will be protected by qualified immunity unless the very act in question has previously been held unlawful. *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034. Rather, the unlawfulness must be apparent in light of pre-existing law. *Id.*

Only if the plaintiff has alleged a violation of a clearly established right should the court next determine whether a reasonable person in the official's position would have known that his actions violated that right. *DiMeglio v. Haines*, 45 F.3d 790, 794 n. 1 (4th Cir.1995). When the inquiry reaches this juncture, "the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow*, 457 U.S. at 818-19, 102 S.Ct. 2727.

III.

A.

Conrad first alleges that the agents, in violation of her Fourth Amendment rights, illegally seized her during their heavy-handed interrogation. The district court concluded that Ms. Conrad was not in custody during her interview. We agree.

A person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained. *United States v. Mendenhall*, 446 U.S. 544, 553,

100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).[2] A seizure has occurred if, in view of all the surrounding circumstances, a reasonable person would have believed that he was not free to leave. *Id.* at 554, 100 S.Ct. 1870; *see also Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988). A person need not make an attempt to leave in order to be seized. *Mendenhall*, 446 U.S. at 554, 100 S.Ct. 1870. The threatening presence of several officers, the display of a weapon by an officer, some physical touching, or the use of words or a tone of voice suggesting that compliance with the officer's request might be compelled, can all translate into a seizure. *Id.*

Conrad argues that a seizure took place because the agents would not allow her to call anyone during the interview, they would not allow her to take two incoming phone calls in private, and they told her not to tell anyone about the interview. Conrad also points to Sanchez's statement to her that the FBI had a search warrant for her home and that "if she did not agree to cooperate, [the FBI] would break down her front door to execute the warrant, [and] the media would be present." (J.A. at 6.)[3] According to Conrad, this statement made her feel as though she was not free to leave.

These factors simply do not amount to a seizure. The interview transpired at a familiar setting, Conrad's workplace. The agents wore no uniforms and displayed no weapons.

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[2] The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." Not all interaction between a police officer and an individual, however, results in a "seizure" in violation of the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

[3] The complaint alleges that Sanchez made the statement on behalf of the FBI but does not state the basis for this knowledge. Nevertheless, because we are operating under the motion to dismiss standard, we must accept this allegation as true.

There are no allegations that the agents used physical force, threatening language, or an intimidating tone. Concerning the phone calls, Conrad does not allege that she attempted to leave the room (to place or take a call in private) and was refused. Nor does she allege, either in the complaint or in her briefs, that the agents told her that she was not free to leave the conference room. Conrad apparently contends only that the agents would not themselves leave the room to give her privacy to talk.

Moreover, Sanchez's statement, though heavy-handed, would not make a reasonable person feel that she was restricted from leaving the interview. The conversation between Conrad and Sanchez pertained to the search of her home and not the ground rules for the interview. In addition, Sanchez made the statement when Conrad first arrived at work, whereas the FBI questioning of Conrad took place several hours later at the end of the day. There is no allegation that Conrad queried the agents about the warrant or the threat. Nor does Conrad allege that the agents knew about Sanchez's statement. Accordingly, we affirm the district court's decision that Conrad was not "seized" during her interview.

B.

Appellants next allege that the search of their computer and home was illegal because (i) the agents had no warrant, and (ii) Conrad's consent to search was involuntary. The Defendants concede that there was no warrant, but contend that the search was valid because Conrad signed a consent form.

Valid consent is a well-recognized exception to the Fourth Amendment prohibition against warrantless searches. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Consent to search is valid only if it was knowing and voluntary and courts assess validity based on

the "totality of the circumstances." *Mendenhall*, 446 U.S. at 557, 100 S.Ct. 1870.[4]

Appellants rely primarily on *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). In *Bumper*, the police searched a house that the defendant shared with his grandmother. When the police arrived, an officer told the defendant's grandmother that they had a search warrant. She responded, "go ahead," and opened the front door. The Supreme Court held that the police could not rely on the grandmother's consent, which was given only after the official conducting the search asserted that he possessed a warrant. *Id.* at 550, 88 S.Ct. 1788. The Court observed that acquiescence to an assertion of lawful authority does not constitute an understanding, intentional and voluntary waiver of rights under the Fourth Amendment, concluding, "[t]he situation is instinct with coercion . . . [w]here there is coercion, there cannot be consent." *Id.* at 549-50, 88 S.Ct. 1788.

Conrad's consent is invalid under the rationale of *Bumper*. Although the agents who conducted the search never claimed to have a warrant, Sanchez told Conrad that the FBI had a search warrant, Conrad believed that Sanchez was conveying this information on behalf of the FBI, and the complaint alleges that Sanchez was indeed acting at the FBI's behest.

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[4] In criminal cases, the burden is on the Government to prove the voluntariness of an individual's consent. *Schneckloth*, 412 U.S. at 222, 93 S.Ct. 2041. The circuit courts are not in agreement about which party bears the burden of proof in a civil suit that alleges a constitutional violation based on involuntary consent. *Compare Valance v. Wisel*, 110 F.3d 1269, 1278-79 (7th Cir.1997) (burden on plaintiff to prove that consent is involuntary), *and Larez v. Holcomb*, 16 F.3d 1513, 1517-18 (9th Cir.1994) (burden on plaintiff), *and Ruggiero v. Krzeminski*, 928 F.2d 558, 562-63 (2nd Cir.1991) (burden on plaintiff), *and Crowder v. Sinyard*, 884 F.2d 804, 824-26 (5th Cir.1989) (burden on plaintiff), *with Tarter v. Raybuck*, 742 F.2d 977, 980-81 (6th Cir.1984) (burden on defendant). Given the posture of this case, however, we need not decide this issue.

Nevertheless, the district court was correct in holding that the Defendants have qualified immunity. The Defendants fall into two categories, the first of which includes Special Agents Halpin and Carr, who secured the consent and conducted the search. There is neither an allegation nor any evidence that these agents directed Sanchez to misrepresent that the FBI possessed a warrant or that the agents even knew about Sanchez's statement. Conrad never mentioned the statement to them. The agents gave Conrad an explicit waiver form, which she signed. The agents truthfully told Trulock that they had no warrant, but that they had secured Conrad's consent. Based upon these facts, no reasonable officer would have believed that Conrad's consent was involuntary. Accordingly, Agents Halpin and Carr enjoy immunity.

The second group of defendants include former FBI Director Freeh and two FBI supervisors, Gallagher and Dillard. In a *Bivens* suit, there is no *respondeat superior* liability. *Estate of Rosenberg v. Crandell*, 56 F.3d 35, 37 (8th Cir.1995). Instead, liability is personal, based upon each defendant's own constitutional violations. While the complaint alleges that Sanchez was speaking at the request of the FBI, there is no allegation that any of these three individuals were personally complicit in Sanchez's alleged misrepresentations. Accordingly, these Defendants also enjoy immunity.

C.

Trulock argues that the search of his password-protected files violated his Fourth Amendment rights. He asserts that the search was improper because: (i) there was no warrant; (ii) neither he nor Conrad consented voluntarily to the search; and (iii) even if Conrad's consent were valid, she did not have the authority to consent to a search of his password-protected files. As we have previously stated, *Bumper* leads us to conclude that Conrad's consent to search was involuntary. Even if her consent were voluntary, however, it would not authorize a search of Trulock's private, password-protected files.

Consent to search in the absence of a warrant may, in some circumstances, be given by a person other than the target of the search. *United States v. Block*, 590 F.2d 535, 539 (4th Cir.1978). Two criteria must be met in order for third party consent to be effective. First, the third party must have authority to consent to the search. *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964). Second, the third party's consent must be voluntary. *Bumper*, 391 U.S. at 548, 88 S.Ct. 1788.

Authority to consent originates not from a mere property interest, but instead from "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that others have assumed the risk that one of their number might permit the common area to be searched." *United States v. Matlock*, 415 U.S. 164, 171 n. 7, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974); *accord Frazier v. Cupp*, 394 U.S. 731, 740, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) (holding that joint use of a duffel bag gave a third party authority to consent to the search of the bag).

We conclude that, based on the facts in the complaint, Conrad lacked authority to consent to the search of Trulock's files. Conrad and Trulock both used a computer located in Conrad's bedroom and each had joint access to the hard drive. Conrad and Trulock, however, protected their personal files with passwords; Conrad did not have access to Trulock's passwords. Although Conrad had authority to consent to a general search of the computer, her authority did not extend to Trulock's password-protected files. *See Block*, 590 F.2d at 541.

In *United States v. Block*, this Court held that the defendant's mother had authority to consent to a search of his room, which was located in the home they shared. The mother's authority did not extend to a search of a locked footlocker

located within the room, however. We noted that authority to consent "cannot be thought automatically to extend to the interiors of every discrete enclosed space capable of search within the area . . . the rule has to be one of reason that assesses the critical circumstances indicating the presence or absence of a discrete expectation of privacy with respect to the particular object." *Id.* at 541.

Trulock's password-protected files are analogous to the locked footlocker inside the bedroom. By using a password, Trulock affirmatively intended to exclude Conrad and others from his personal files. Moreover, because he concealed his password from Conrad, it cannot be said that Trulock assumed the risk that Conrad would permit others to search his files. Thus, Trulock had a reasonable expectation of privacy in the password-protected computer files and Conrad's authority to consent to the search did not extend to them. Trulock, therefore, has alleged a violation of his Fourth Amendment rights.

Nevertheless, the Defendants are entitled to immunity because a reasonable officer in their position would not have known that the search would violate clearly established law.[5] At the time of the search, at least one published case, although from a district court outside this circuit, held that a third party may consent to the search of a shared computer when the third party has complete access to the computer. *See United States v. Smith*, 27 F.Supp.2d 1111 (C.D.Ill.1998). *But see United States v. Barth*, 26 F.Supp.2d 929 (W.D.Tex.

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[5] According to the allegations in the complaint, Agent Carr and the unidentified computer specialist were the only Defendants directly involved in the search and seizure of Trulock's password-protected files. Although Agent Halpin was present at the townhouse, the complaint does not allege that he participated in the search. Furthermore, there is no allegation that the supervising Defendants (Freeh, Gallagher, and Dillard) either ordered the search of the files or knew about the password-protection.

1998) (holding that a computer repair technician did not have authority to consent to a search of the defendant's computer).

Conversely, we are aware of no reported cases answering whether an individual has a reasonable expectation of privacy in password-protected files stored in a shared computer. Trulock, though conceding the absence of computer specific caselaw, urges us to recognize a clearly established right based upon *Block* and other similar cases. We decline to do this. Although cases involving computers are not *sui generis*, the law of computers is fast evolving, and we are reluctant to recognize a retroactive right based on cases involving footlockers and other dissimilar objects. Thus, a reasonable officer in the Defendants' position would not have known that Conrad's consent did not authorize them to search Trulock's files; the Defendants are, therefore, entitled to qualified immunity.[6]

D.

In his final claim, Trulock alleges that the Defendants trammeled his First Amendment right to free speech by retaliating for his *National Review* article.[7] The district court dismissed Trulock's claim, holding that "other than the timing of the interrogation and search, the complaint presents no indication that the actions by the Defendants were other than a good faith effort to determine whether classified information was being unlawfully possessed." (J.A. at 43.) We must disagree.

The First Amendment guarantees an individual the right to speak freely, including the right to criticize the government

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[6] As previously stated, the complaint does not allege that the agents knew of Sanchez's statement about a warrant. They had no reason, therefore, to believe that Conrad's consent was anything but voluntary.

[7] It should be noted that the article itself is not part of the record. We know only that it was highly critical of the FBI and other departments of the federal government.

and government officials.[8] *New York Times v. Sullivan*, 376 U.S. 254, 273, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *accord Barrett v. Harrington*, 130 F.3d 246, 264 (6th Cir. 1997). To protect that right, public officials are prohibited from retaliating against individuals who criticize them. *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir.2000). Fear of retaliation may chill an individual's speech, and, therefore, permit the government to "'produce a result which [it] could not command directly.'" *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (alterations in original) (citation omitted); *ACLU v. Wicomico County, Md.*, 999 F.2d 780, 785 (4th Cir.1993).

To establish a First Amendment retaliation claim, a plaintiff must prove three elements: (i) that his speech was protected; (ii) that the defendant's alleged retaliatory action adversely affected his constitutionally protected speech; and (iii) that a causal relationship existed between his speech and the defendant's retaliatory action. *Suarez*, 202 F.3d at 685-86.

In count two of the complaint, Trulock alleges that the Defendants retaliated against him for publishing the critical article. The Defendants argue that dismissal was justified because: (i) the complaint does not allege facts which, if proven, would show the causal relationship between Trulock's speech and the Defendants' actions; and (ii) the Defendants are entitled to qualified immunity.

Ordinarily, a complaint should not be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) unless it appears beyond all doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Labram v. Havel*, 43

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[8] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."

F.3d 918, 920 (4th Cir.1995). Under the motion to dismiss standard, factual allegations, once plead, must be accepted as true. *See Jenkins v. McKeithen*, 395 U.S. 411, 421-22, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969).

The liberal pleading requirements of Rule 8(a) demand only a "short and plain" statement of the claim. A plaintiff often must offer more detail, however, than the bald statement that he has a valid claim of some type against the defendant. *Migdal v. Rowe Price-Fleming Int'l*, 248 F.3d 321, 326 (4th Cir.2001).[9] Although there is no heightened pleading standard in qualified immunity cases, a district court has the discretion to ask a plaintiff to "put forward specific, non-conclusory factual allegations that establish improper motive." *Crawford-El v. Britton*, 523 U.S. 574, 598, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998).

Whether Trulock's claim can survive a motion for summary judgment remains to be seen, but we find that Trulock has alleged sufficient facts in support of his retaliation claim to withstand a motion to dismiss and proceed to discovery. The complaint contains facts that bolster Trulock's claim of improper motive. First, the timing of the search raises an inference of retaliatory motive. *Stever v. Independent School District No. 625*, 943 F.2d 845, 852 (8th Cir.1991). The article was published in early July 2000 and the search occurred on July 14, 2000. The article chastised the White House, the CIA, the DOE, and the FBI, the very agency that executed the search. According to the Plaintiffs, a criminal referral is necessary for the FBI to commence an official investigation. The complaint alleges, however, that

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[9] "The presence [ ] of a few conclusory legal terms does not insulate a complaint from dismissal under Rule 12(b)(6) when the facts alleged in the complaint" do not support the legal conclusion. *Young v. City of Mount Ranier*, 238 F.3d 567, 577 (4th Cir.2001) (dismissing Fourteenth Amendment claim where complaint alleged "deliberate indifference" but included no facts to support allegation).

the FBI initiated the investigation without receiving a criminal referral from the DOE. Sanchez told Conrad, on behalf of the FBI, that there was a search warrant when there was none. Finally, two weeks after the incident, Sanchez told Conrad that if she initiated a lawsuit, Sanchez, to protect the "Bureau," would deny telling Conrad that the FBI claimed to have a search warrant. All of these factors, when viewed together and accepted as true, raise a reasonable inference that the interrogation and search were retaliatory. We cannot conclude beyond all doubt that Trulock can prove no set of facts in support of his claim that would entitle him to relief.

Having found that Trulock alleged the violation of a constitutional right, we must next address the Defendants' claim of qualified immunity. It is well established that a public official may not misuse his power to retaliate against an individual for the exercise of a valid constitutional right. *Suarez v. McGraw*, 202 F.3d 676, 685 (4th Cir.2000); *accord Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir.1998).[10] This holds true even when the act of the public official, absent the retaliatory motive, would otherwise have been proper. *ACLU*, 999 F.2d at 785. Thus, we hold that it was clearly established at the time of the search that the First Amendment prohibits an officer from retaliating against an individual for speaking critically of the government.

Finally, we turn to whether a reasonable officer would have known that retaliatory conduct was impermissible. The Defendants make only one contention on this issue. They argue that a reasonable officer could have believed that the magazine article, because of its content, did not enjoy First Amendment protection. The Defendants' effort to support

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[10] "[G]overnment officials in general, and police officers in particular, may not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity. Surely anyone who takes an oath of office knows—or should know—that much." *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir.1990).

this argument is half-hearted at best. They have not placed the article on the record. They have not stated why the contents would lack First Amendment protection. They have made no effort to show that a prudent officer of the FBI could reasonably have believed that the article did not enjoy First Amendment protection. Simply put, Defendants have done nothing more than offer their bald assertions that they are entitled to qualified immunity. Accordingly, we remand the case to the district court to proceed on the retaliation claim.

IV.

For the reasons stated herein, we vacate that portion of the district court's order that dismissed Trulock's First Amendment retaliation claim and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

MICHAEL, *Circuit Judge*, concurring in part and dissenting in part:

I dissent from part III.C. of the majority's opinion, but otherwise concur. The owner of password-protected computer files has a clear expectation of privacy in those files that is protected by the Fourth Amendment. Another person who does not know the passwords has no authority to consent to a search of these private files because he lacks the "joint access or control" required by *United States v. Matlock*, 415 U.S. 164, 171 n. 7, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). The plaintiffs, Notra Trulock and Linda Conrad, both used Conrad's computer, but each maintained personal files that were protected by passwords. Conrad told the defendant-FBI agents that she did not know either the passwords for Trulock's files or the contents of those files. As a result, Conrad's general consent to a search of her computer could not authorize the FBI's warrantless search of Trulock's password-protected files. This should have been abundantly clear to any reasonable law enforcement officer operating in the year 2000. I therefore respectfully dissent from the majority's decision to affirm the grant of qualified immunity to the FBI officials on the search of Trulock's password-protected computer files. On a separate point, I agree with the majority that the officials are entitled to qualified immunity on their warrantless search of Conrad's house, but I write independently to explain why I reach that conclusion.

I.

The majority holds that Conrad lacked the authority to consent to a search of Trulock's password-protected computer files. *Ante* at 406. I agree. I also agree with the majority's conclusion, *see id.*, that Trulock's computer files are analogous to the locked footlocker in *United States v. Block*, 590 F.2d 535, 540-42 (4th Cir.1978) (holding that a mother's consent to the search of her son's room did not extend to his locked footlocker). I respectfully disagree, however, with the

majority's view that the defendants are entitled to qualified immunity because there was no clearly established law saying that one co-user's consent to search a computer does not extend to the password-protected files of another co-user when the consenting co-user does not know the other's passwords. I would reject the defendants' qualified immunity defense because the unlawfulness of searching Trulock's password-protected files was readily apparent in light of the principles established in *Matlock* and reiterated in *Block*.

Qualified immunity shields a government official from civil liability so long as his conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In deciding whether a right is clearly established for qualified immunity purposes, the question is not whether the general right (here, the right to be free from unreasonable searches) is clearly established. Rather, the question is whether the right is clear in relation to the specific conduct being challenged. *See Wiley v. Doory*, 14 F.3d 993, 995 (4th Cir.1994). In other words, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). This does not mean, however, that "the very action in question [must have] previously been held unlawful." *Id.* Liability will attach if the unlawfulness of the conduct would be "apparent" to a reasonable officer "in the light of pre-existing law." *Wilson v. Layne*, 526 U.S. 603, 615, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). For the class of "clearly established" rights "includes not only already specifically adjudicated rights, but those *manifestly included* within more general applications of the core constitutional principle invoked." *Pritchett v. Alford*, 973 F.2d 307, 314 (4th Cir.1992) (emphasis added).

The central question here is whether in the light of pre-existing law it would have been apparent to a reasonable FBI agent that Conrad's general consent to search the computer she shared with Trulock did not authorize the search of Trulock's password-protected files stored in that computer. In answering this question, we look to Supreme Court cases, "'cases of controlling authority in [this] jurisdiction,' [and] the 'consensus of cases of persuasive authority' from other jurisdictions" as sources of clearly established law. *Amaechi v. West*, 237 F.3d 356, 363 (4th Cir.2001) (quoting *Wilson*, 526 U.S. at 617, 119 S.Ct. 1692). No court has decided a case involving third-party consent to the search of password-protected computer files. Nevertheless, we have clearly established law that is applicable: it comes from *Matlock* and *Block*.

A warrantless search can sometimes be authorized by a third party who is not the target of the search. *Matlock* established that third-party consent is valid only when the third party and the target have "common authority" over the area or item sought to be searched. *Matlock*, 415 U.S. at 171, 94 S.Ct. 988. Common authority, the Supreme Court explained, rests on "mutual use of the property by persons generally having joint access or control for most purposes." *Id.* at 171 n. 7, 94 S.Ct. 988. When common authority exists, the target of a search has "assumed the risk" that another person with authority over a shared area or item might consent to a search. *Id.* The principle that valid third-party consent requires common authority should be sufficient to defeat the defendants' claims of qualified immunity in this case. Specifically, it should have been obvious to law enforcement officials operating in the year 2000 that common authority over password-protected computer files requires knowledge of the passwords.[1] Even so, the government

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[1] Knowledge of the passwords is necessary, but not sufficient, to establish common authority over password-protected files. The third

argues that because Conrad had common authority over the computer she shared with Trulock, the defendant-FBI agents reasonably failed to understand that her general consent to search the computer did not authorize the search of all files stored in the computer. The government's argument fails because a reasonable officer who understood our decision in *Block* would have known that the search of Trulock's private files was unlawful.

In *Block* we applied *Matlock* in deciding whether a third party's consent to the search of a general area over which she has common authority validates the search of every item within that area. The mother in *Block* had general access to the room in which her defendant son's footlocker was located, and she signed a written consent form authorizing a "complete search" of her son's room. *Block*, 590 F.2d at 537 n. 1. Nevertheless, we held that the mother's consent did not authorize the search of her son's footlocker. We emphasized that authority to consent to the search of a general area "cannot be thought automatically to extend to the interiors of every discrete enclosed space capable of search within the area." *Id.* at 541. An enclosed space or distinct item requires independent consent for a search when the circumstances indicate that the person targeted has "a discrete expectation of privacy with respect to the particular [space or item]." *Id.* at 541 n. 8. Privacy expectations are signaled, for example, when the space or item is secured or "is commonly used for preserving privacy." *Id.* This means, in other words, that a third party's common authority ends where the target's discrete expectation of privacy begins. In sum, *Block* announced the general principle that when a third party and the target of a search have common authority over a general

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party must also have "joint access" to the files "for most purposes." *Matlock*, 415 U.S. at 171 n. 7, 94 S.Ct. 988. If Conrad had known Trulock's passwords and had enjoyed general access to his files, this would be a different case.

area, the third party's consent to a search of the general area does not authorize the search of a specific item within that area if the circumstances indicate that the target has a discrete expectation of privacy with respect to that item. This principle dictates the result in this case.

The majority readily agrees that "Trulock's password-protected files are analogous to the locked footlocker inside the bedroom" in *Block* and that Trulock has therefore "alleged a violation of his Fourth Amendment rights." *Ante* at 403. That conclusion is unassailable because the factual parallels between this case and *Block* are striking. The mother in *Block* had common authority over her son's bedroom, just as Conrad had common authority over the computer she shared with Trulock. The mother gave consent to search the bedroom, just as Conrad gave consent to search the computer. The mother told the police that the footlocker belonged to her son, that he kept it locked, and that she did not have the key. *Block*, 590 F.2d at 538. Conrad told the FBI agents that she did not know what information Trulock kept in his computer files and that she could not access those files because she did not know the passwords. Just as the mother's consent to the search of her son's bedroom did not extend to his locked footlocker inside that room, Conrad's consent to the search of her computer did not extend to Trulock's "locked" files inside that computer. Indeed, the only notable difference between the two cases is that *Block* involved a locked footlocker and this case involves password-protected computer files. For the majority, however, the immunity decision turns on this one difference. The majority gives qualified immunity to the defendants because of its reluctance to "recognize a retroactive right based on cases involving footlockers and other dissimilar objects." *Ante* at 404. In essence, the majority is hesitant to hold the FBI agents responsible for applying *Block*'s clearly established legal principle in a different factual context. The agents, the majority believes, could not be expected to understand that

the expectations of privacy signaled by a locked footlocker and a password-protected computer file are essentially the same.

While it is true that knowing a legal principle and knowing whether to apply it in a particular circumstance are two different things, *see Lappe v. Loeffelholz*, 815 F.2d 1173, 1180 n. 7 (8th Cir.1987), qualified immunity was never intended to relieve government officials from the responsibility of applying familiar legal principles to new situations. To say otherwise would ignore the Supreme Court's warning that liability under § 1983 (and *Bivens*) does not require "the very action in question [to have] previously been held unlawful." *Wilson*, 526 U.S. at 615, 119 S.Ct. 1692. Whatever the *physical* differences between locked footlockers and password-protected computer files, the question here must be whether a reasonable officer would believe that there is a *legal* difference for Fourth Amendment purposes. In other words, is there any reason why a reasonable FBI agent fully apprised of the principles in *Block* would believe that he could lawfully search Trulock's password- protected files on the basis of Conrad's general consent to search the computer? If there is no such reason, the unlawfulness of the agents' conduct in this case is "apparent," *Wilson,* 526 U.S. at 615, 119 S.Ct. 1692, and qualified immunity does not apply. *Cf. Lassiter v. Alabama A & M University*, 28 F.3d 1146, 1150 (11th Cir.1994) (stating that qualified immunity is lost when pre-existing law "dictate[s]" or "compel[s]" the conclusion that a defendant's conduct violates federal rights).

Any reasonable officer should have recognized that the privacy expectations attaching to a password-protected computer file are essentially the same as those attaching to a locked footlocker. A computer file is a repository for information and images in electronic form, just as a footlocker is a repository for more tangible items such as papers and other personal effects. Once password protection attaches to a

computer file, that protection is the electronic equivalent of the lock on a footlocker containing items that are intended to remain private. The password is an electronic key. While the medium for ensuring privacy is different, the result—a clear signal that privacy is expected against all those who lack the key (or the password)—is the same. There is simply no reason why a reasonable officer who understood that a locked footlocker signals a discrete expectation of privacy would believe that a password-protected computer file does not. The physical differences between the two repositories have no legal significance.

This conclusion is not undercut by the majority's observation that the law of computers is "fast evolving." *Ante* at 403. In fact, the case law supports my point that the differences between computer files and physical repositories of personal information and effects are legally insignificant. Courts have not hesitated to apply established Fourth Amendment principles to computers and computer files, often drawing analogies between computers and physical storage units such as file cabinets and closed containers. *See, e.g., In re Grand Jury Subpoena Duces Tecum*, 846 F.Supp. 11, 12-13 (S.D.N.Y.1994) (analogizing computer hard drives and floppy disks that contained electronic documents to file cabinets that contained paper documents in deciding that subpoena for computer-accessible data was unreasonably broad); *United States v. Chan*, 830 F.Supp. 531, 534-35 (N.D.Cal.1993) (holding that "[t]he expectation of privacy in an electronic repository for personal data is . . . analogous to that in a personal address book or other repository for such information. . . . [A]n individual has the same expectation of privacy in a pager, computer or other electronic data storage and retrieval device as a closed container . . . ."") (internal quotation and citation omitted); *United States v. David*, 756 F.Supp. 1385, 1390 (D.Nev.1991) (recognizing that a computer memo book "is in distinguishable from any other closed container, and is entitled to the same Fourth Amendment

protection"). Our circuit has also drawn analogies between computer files and physical repositories of personal information and effects, such as lockers. *See United States v. Simons*, 206 F.3d 392, 398 (4th Cir.2000) (citing *American Postal Workers Union v. United States Postal Serv.*, 871 F.2d 556, 560 (6th Cir.1989)), to compare employee lockers subject to random inspection under employer policy with computer files subject to "appropriate" inspection under employer policy allowing monitoring of employee Internet use).[2] Thus,

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[2] These analogies have limitations, of course. For example, the Tenth Circuit rejected an argument based on the file cabinet analogy in deciding that a detective exceeded the scope of a search warrant when he opened certain of the defendant's computer files. *See United States v. Carey*, 172 F.3d 1268 (10th Cir.1999). In *Carey* the government argued that an officer with a warrant to search a file cabinet for files containing certain information can open every drawer of the file cabinet, even when the labels on the file drawers suggest that none of the files within that drawer fall within the scope of the warrant. Opening every drawer, the government insisted, is the only way to be sure that the labels on the file drawer are accurate. The government then argued by analogy that an officer executing a warrant to search files on a computer for specified information can also open all of the computer's files, including those files whose names suggest that they contain no information within the scope of the warrant. *See id.* at 1274-75. The court held that the file cabinet analogy does not extend this far because in the case of a computer, officers may use key word searches and similar techniques to identify which files fall within the scope of a warrant without the need to open all of the files in the computer. *See id.* at 1275-76; *see also* Raphael Winick, *Searches and Seizures of Computers and Computer Data*, 8 Harv. J.L. & Tech. 75, 103-11 (1994) (discussing the limitations of the closed container analogy and recommending that courts adopt a version of the "intermingled documents" rule adopted in *United States v. Tamura*, 694 F.2d 591, 595-96 (9th Cir.1982), to govern computer searches). The *Carey* court's limitation on the file cabinet analogy makes sense because the court relied on a feature of computer files unique to the electronic medium, namely, their amenability to key word searches and similar techniques. The detective's failure to use these techniques to limit the scope of his computer search made the search unreasonable. *See Carey*, 172 F.3d at 1276. Thus, the physical differences between computer files

neither case law nor common sense suggests any reason for thinking that the principles in *Block* do not dictate the result in this case.

While the majority bases its grant of qualified immunity primarily on the factual differences between this case and *Block*, it also suggests that there is no clearly established law governing the search of Trulock's protected files because at least one district court opinion from another circuit has upheld the search of a shared computer based on third-party consent. *Ante* at 403 (citing *United States v. Smith*, 27 F.Supp.2d 1111 (C.D.Ill.1998)). *Smith*, however, is consistent with *Block*, and its reasoning actually supports the conclusion that Conrad's consent to search the computer did not encompass Trulock's password-protected files.

In *Smith* the court upheld a search of the defendant's computer files based on third-party consent, but the facts were significantly different from those presented here. There, the defendant's housemate consented to a search of the defendant's computer, which was located in an alcove in the housemate's bedroom. The court found that the housemate had the necessary joint control and access to the computer and its surrounding area because the computer was accessible to all members of the household, it had been used by the housemate's daughter, and the defendant had tried to teach the housemate to use it. *Smith,* 27 F.Supp.2d at 1115-16. Although there was some factual dispute about whether the defendant had used passwords to protect computer files containing images of child pornography, the court found that

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and file cabinets made a legal difference in *Carey*, and the court properly warned the uncritical acceptance of the file cabinet analogy could lead courts to sanction indiscriminate searches of computer files. Nevertheless, no court to my knowledge has suggested that the differences between computer files and other repositories for personal information raise difficult problems in deciding whether a given repository signals a "discrete expectation of privacy." *Block*, 590 F.2d at 541 n. 8.

these files were not password protected. *Id.* at 1116 ("[I]t is important to note that none of the officers who searched the computer found passwords on the computer. This belies Defendant's claim of exclusive and possessory control and indicates that [the housemate] could consent to the search of the home and computer and that the consent extended to the computer area and the computer itself."). At most, then, *Smith* stands for the proposition that a third party with shared access to a computer may consent to the search of all the files on the computer that are *not protected* by individualized passwords. Indeed, the court's conclusion that a lack of password protection discredits claims of exclusive possession and control suggests that the *presence* of such protection would establish exclusive possession and control, thereby placing the password-protected files outside the scope of valid third-party consent. As the majority recognizes, *Smith* held only that "a third party may consent to the search of a shared computer when the third party has complete access to the computer." *Ante* at 403. Certainly Conrad had general access to the computer, and certainly a reasonable officer would have believed that Conrad had the authority to consent to a search of all of the commonly accessible files on the computer. But access to a computer need not—and here it did not—extend to each and every file on that computer. A reasonable officer aware of the principles in *Block* would not have thought otherwise.

I would hold, therefore, that the search of Trulock's password-protected files violated clearly established law because the unconstitutionality of the search was readily apparent in light of the core principles applied in *Matlock* and *Block*. This position is supported by the government's own conclusions about how Fourth Amendment principles apply to computer technology. In a manual designed to educate federal agents about the law governing searches and seizures of computers, the Department of Justice (DOJ) explicitly acknowledges that "it appears likely that encryption and

password-protection would in most cases indicate the absence of common authority to consent to a search among co-users who do not know the password or possess the encryption key." *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, at p. 14 (2001), available at *www.cybercrime.gov/searchmanual.pdf*.[3] It is especially striking that the DOJ based its conclusion on an analysis of *Block* and *Smith*, *see id.*, the very authorities relied upon by the majority to assert that there was no clearly established law indicating that Conrad had no authority to consent to the search of Trulock's password-protected files. In effect, the government now invites this court to find that the law governing third-party consent to computer searches is uncertain even though it has shown itself quite capable of correctly resolving the question presented in this case. I would decline this invitation.

Qualified immunity is intended "to protect those officers who reasonably believe that their actions do not violate federal law," *Doe v. Broderick*, 225 F.3d 440, 453 (4th Cir.2000), but it should not function to give officers "one free violation" of constitutional rights every time they are asked to apply a well-established principle to a new set of facts, *Wilson*, 526 U.S. at 625, 119 S.Ct. 1692 (Stevens, J., concurring in part and dissenting in part). The defendants in this case should have known that they had no right to search Trulock's password-protected computer files, and thus they should not be given qualified immunity.

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[3] On this point, the contrast with *Wilson v. Layne* is instructive. There, the Supreme Court buttressed its finding of qualified immunity by stating that the police reasonably relied on a U.S. Marshals Service policy governing media ride-alongs which clearly contemplated that media members might accompany police into private homes. *See Wilson*, 526 U.S. at 617, 119 S.Ct. 1692. In contrast, the agents' conduct here contravened the DOJ's own understanding of the legal norms governing third-party consent to computer searches.

II.

In part III.B. of its opinion the majority concludes that although Conrad did not voluntarily consent to the search of her house, the defendants are entitled to qualified immunity from any liability for that search. While I agree with the majority's conclusion, I write separately because my reasons for granting the defendants qualified immunity on the house search may differ from the majority's.

Although Conrad signed a written consent form authorizing the FBI to search her house, she alleges that this consent was involuntary because it was prompted by her belief that the FBI already had a search warrant and that the FBI would break down her front door and search the house in the presence of the media and local police if she refused to cooperate. Although the voluntariness of consent for Fourth Amendment purposes is "a question of fact to be determined from the totality of all the circumstances," *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), one factor that nearly always invalidates consent is an assertion by law enforcement officers that they have the authority to search with or without consent. *See, e.g., Bumper v. North Carolina*, 391 U.S. 543, 550, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968) (holding that consent was invalid when given after police officers claimed authority to search home under a warrant); *United States v. Lattimore*, 87 F.3d 647, 652 (4th Cir.1996) (en banc) (stating that police officer's assertion that he would "'call a drug dog'" to search suspect's car if suspect refused consent "would raise serious questions concerning the voluntariness of his consent"); *Orhorhaghe v. I.N.S.*, 38 F.3d 488, 500 (9th Cir.1994) (stating that "[i]t is well established that there can be no effective consent to a search or seizure if that consent follows a law enforcement officer's assertion of an independent right to engage in such conduct."). Consent is also involuntary when officers threaten a person with adverse consequences if she refuses to

consent to a search. *See State v. Davis*, 261 Ga. 225, 404 S.E.2d 100, 100-01 (1991) (affirming trial court's ruling that consent was involuntary when police told defendant's mother they would break down the door if she refused to cooperate); *Reyes v. Edmunds*, 472 F.Supp. 1218, 1227-28 (D.Minn. 1979) (holding that consent was involuntary when welfare recipient was told that her benefits would be terminated if she refused to consent to the search of her home). Here, Conrad alleges that the FBI, acting through Lawrence Sanchez (Conrad's supervisor at the Department of Energy), claimed to have authority to search her house and threatened her with property damage and public humiliation if she refused to cooperate. Under these circumstances, her consent was not voluntary.

The government claims that there are two reasons why this case is not controlled by *Bumper*, in which the Supreme Court held that consent is involuntary when given after "the official conducting the search has asserted that he possesses a warrant." *Bumper*, 391 U.S. at 548, 88 S.Ct. 1788. First, it argues that this case is distinguishable from *Bumper* because the complaint fails to allege that the FBI agents who conducted the search claimed they had a warrant or knew that Sanchez had told Conrad that they had a warrant. Second, the government argues that because Sanchez is neither a defendant nor a law enforcement official, what he allegedly said to Conrad does not bear on whether the defendants violated her constitutional rights. Like the majority, I refuse to read *Bumper* so narrowly. *Bumper* stands for the proposition that consent cannot be voluntary when the government has led the person consenting to "erroneous[ly] belie[ve] that [s]he cannot protect [her] privacy by refusing to give consent." 3 Wayne R. LaFave, *Search and Seizure*, § 8.2(c) at 652 (3rd ed.1996). If, as the complaint alleges, Sanchez was acting on behalf of the FBI, then the government led Conrad to believe that her only choice was between losing her privacy quietly and losing it in the glare of the media

spotlight. That the government conveyed this message through Sanchez rather than through the FBI agents conducting the search does not change the result under *Bumper*.

The majority and I may differ, however, in our reasons for concluding that the defendants are entitled to qualified immunity on the house search. Qualified immunity protects government officials who make reasonable mistakes of fact as well as those who make reasonable mistakes about what the law requires in a particular situation. *Karnes v. Skrutski*, 62 F.3d 485, 498 (3rd Cir.1995) (stating that qualified immunity protects those who make "'mere mistakes in judgment, whether the mistake is one of fact or one of law'" (quoting *Butz v. Economou*, 438 U.S. 478, 507, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978))). As my previous discussion of the search of Trulock's computer files illustrates, qualified immunity analysis usually turns on whether the illegality of the defendant's conduct was apparent in the light of clearly established law. Here, however, I believe the defendants are entitled to qualified immunity only because it is undisputed that they did not know all of the relevant facts. Because the complaint fails to allege either that the defendants told Conrad that they had a warrant or that they knew Sanchez had told Conrad that they had a warrant, we must assume that the defendants were unaware of Conrad's belief that they would search her house with or without her consent. Without any awareness of what Sanchez had said to Conrad, the defendants could have reasonably believed that Conrad's written consent was valid. The defendants are therefore entitled to qualified immunity. On my analysis, then, the crucial factor in explaining why the defendants should receive qualified immunity is that they made a reasonable mistake of fact about what Conrad believed. Because the defendants did not know what Sanchez had told Conrad, they reasonably failed to recognize that Conrad believed that she could no longer protect her privacy by refusing to consent to the search of her house.

In explaining its qualified immunity holding, the majority also emphasizes the defendants' lack of knowledge of the conversation between Sanchez and Conrad. Thus, the majority and I may agree that qualified immunity is justified only because the defendants made a reasonable mistake of fact. I wish to be explicit on the point, however, because I could not accept the proposition that the defendants in this case made a reasonable mistake of law. Specifically, I would refuse to grant the defendants qualified immunity if the complaint had alleged that any of the defendants had personally directed Sanchez to threaten Conrad or that the defendants knew that Sanchez had conveyed threats to Conrad at the behest of someone in the FBI. On those facts, the defendants' only argument for qualified immunity would have been that the invalidity of Conrad's consent was not readily apparent in light of the factual distinctions between this case and *Bumper*. For example, the government might have argued that this case differs from *Bumper* because there the officers who claimed to possess a warrant also conducted the search, whereas here Sanchez claimed that the FBI had a warrant but the agents who conducted the search did not make that claim. I would reject such arguments for reasons similar to those given in part I above. *Bumper* clearly establishes that there can be no valid consent when the government has led a person to believe that her consent is irrelevant, and there is no reason why a reasonable officer would think that the factual differences between *Bumper* and this case are legally significant.

III.

In sum, I agree with the majority's disposition of this case, except that I respectfully dissent from its decision to grant the defendants qualified immunity on Trulock's claim that the warrantless search of his password-protected computer files violated his Fourth Amendment rights. I would therefore reverse the district court's order granting the defendants' motion to dismiss that claim.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 00-1268-A

NOTRA TRULOCK, III, *et al.*,
Plaintiffs,

v.

LOUIS FREEH, *et al.*,
Defendants.

ORDER

This matter comes before the court on defendants' motion to dismiss, pursuant to Fed. R. Civ. P. 12(b). Upon consideration of the parties' submissions, and for the reasons set forth in the Memorandum Opinion filed this day, it is hereby

ORDERED that:

1. The defendants' motion to dismiss is GRANTED; and

2. This case is therefore DISMISSED with prejudice.

/s/ Albert V. Bryan, Jr.
ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
September 22nd, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 00-1268-A

NOTRA TRULOCK, III, *et al.*,
Plaintiffs,

v.

LOUIS FREEH, *et al.*,
Defendants.

Memorandum Opinion

Notra Trulock, III is a former Director of the Office of Intelligence and the Office of Counterintelligence for the United States Department of Energy ("DOE"). While serving in those positions, Mr. Trulock alleges that he uncovered evidence of foreign theft of nuclear weapons information. Mr. Trulock maintains that he brought such information to the DOE, the White House, the CIA and the FBI but was either ignored or blocked. In 1999, Mr. Trulock left his position at the DOE and shortly thereafter began writing a "personal reflections-type" manuscript about his experiences at the DOE. He submitted the manuscript in March 2000 to the DOE for approval prior to publication. No such approval was obtained; the parties dispute whether DOE merely declined to review the manuscript or whether DOE actually denied publication. Regardless, an excerpt from that manuscript was published in the *National Review* periodical in July 2000.

Immediately after the publication of Mr. Trulock's article, FBI agents questioned Mr. Trulock's housemate and landlord, Linda Conrad, in the conference room at her place of work. Ms. Conrad is also an employee with the DOE, serving as the Executive Assistant to the Director of the Office of

Intelligence. Ms. Conrad asserts that her DOE supervisor told her that these FBI agents had a search warrant for her home and would "break down her door" if she failed to cooperate. The parties do not dispute that Ms. Conrad was extremely upset during the course of the interrogation. After a 3-3½ hour interview subsequent to which Ms. Conrad signed a consent-to-search form, the agents followed her home. Mr. Trulock, present at the home upon the agents' arrival, questioned whether the agents had a warrant but was told that none was needed as Ms. Conrad had consented. During the subsequent search, an unnamed computer specialist, known in these proceedings as defendant Jane Doe, arrived to review the contents of the computer used by both plaintiffs. Although both plaintiffs had access to the computer, each had their own password-protected personal files which were unavailable to the other individual. When she departed, the computer specialist took the hard drive. Prior to her leaving, however, she copied the contents of the hard drive, gave such copies to each of the respective plaintiffs, and left a receipt for the drive. The defendants allege that shortly after this search, media reports appeared detailing the episode, and eight days later, their home was broken into and their dog injured.

The plaintiffs are both claiming violations of the Fourth Amendment freedom from unreasonable search and seizure. Mr. Trulock is further asserting a violation of his First Amendment freedom speech. He alleges that this search and seizure was motivated by retaliation. Mr. Trulock also maintains that the taking of his hard drive was not only an invasion of privacy but has caused him to suffer a loss of income, loss of personal property, emotional distress and loss of reputation.

The defendants include the agents alleged to have conducted the investigation as well as the Director of the FBI, Louis Freeh, the FBI's Assistant Director in charge of its

National Security Division, Neil Gallagher, and the FBI's Inspector-In-Charge of the task force investigating the theft and compromise of U.S. nuclear secrets, Steve Dillard. It is alleged that these latter defendants communicated with the agents, were well-aware that violations of the plaintiffs' rights were transpiring and insisted on going forward with the investigation.

Discussion

The defendants presently seek a Rule 12(b) dismissal. The defendants assert several bases for their motion. First, the defendants maintain that the plaintiffs' exclusive remedy is under the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa-2000aa-12. This act sets out the conditions and limitations on government officers in searching and seizing work product or other documentation believe to be intended for public dissemination. The defendants next assert that the complaint failed to allege any personal and substantial involvement by defendants Freeh, Gallagher and Dillard. According to the defendants, there is no respondeat superior liability in civil rights litigation, and as such, the claim against these defendants must rest on acts or omissions of the defendants individually, not on those of others in the same agency. The defendants then argue that Ms. Conrad was never unlawfully seized, based upon a reasonable person standard, and that even if the interview did violate the Fourth Amendment, these defendants would be immune under the qualified immunity defense. In the same way, all defendants would be immune for having reasonably believed that consent was voluntary and valid for the search of the home and computer files. Lastly, as concerns Mr. Trulock's First Amendment claim, the defendants maintain that the plaintiff has failed to allege facts which would establish that the action of any of the defendants was caused by hostility rather than merely a lawful search for classified information.

It is the opinion of the court that the Privacy Protection Act is not the exclusive remedy in this matter. There is no indication that the searches concerned matters intended to be disseminated to the public. A limited dissemination had already occurred, and there was no allegation that any further such public communication was contemplated.

Regarding the liability of the director defendants, in a motion such as this one, the court must accept the allegations presented in the complaint. In so doing, the court finds the plaintiffs to have alleged personal involvement by the director defendants sufficient to survive a Rule 12(b)(6) motion.

Despite these prior findings, this court grants the motion to dismiss on the basis of qualified immunity. Here, the court concludes that Ms. Conrad was not in custody at the time of the interrogation. There is no evidence that her will was so overborne as to render her consent invalid, and if she chose to sign the consent form without reading its contents, then she must abide by the consequences. Her supervisor, Mr. Sanchez's, alleged threats cannot overcome this qualified immunity in which the agents and officers are clothed. Armed with an apparently valid consent, the agents were justified in concluding that Ms. Conrad had authority to permit entry into the home and to search its contents, including the computer found therein. The complaint does not reveal a violation of clearly established law or that any violation of the plaintiffs' rights occurred. *McVey v. Stacy*, 157 F.3d 271, 276-77 (4th Cir. 1998). The officers acted on a reasonable belief of their authority to do what they did. *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 786 (4th Cir. 1998), *quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (". . . their conduct does not breach "clearly established statutory or constitutional rights of which a reasonable person would have known.'"); *McCoy v. Hernandez*, 203 F.3d 371, 376 (5th Cir. 2000).

As regards Mr. Trulock's First Amendment retaliation claim, other than the timing of the interrogation and search, the complaint presents no indication that the actions by the defendants were other than a good faith effort to determine whether classified information was being unlawfully possessed. With respect to the remaining complaints, the defendants are clothed with qualified immunity.

Conclusion

For the foregoing reasons, the Court grants the defendants' motion, and the case is dismissed with prejudice.

/s/ Albert V. Bryan, Jr.
ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
September 22nd, 2000

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Case Number: 00-1268A

NOTRA TRULOCK, *et al.*,
6616 Midhill Place
Falls Church, VA 22043

v.

LOUIS FREEH, *et al.*,
in his personal capacity
c/o The Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, DC 20535

SUMMONS IN A CIVIL CASE

TO: (Name and address of defendant)

STEVE CARR
c/o The Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, DC 20535

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

BRETT M. WOOD, Esq.
JUDICIAL WATCH, INC.
Suite 725
501 School Street, S.W.
Washington, DC 20024
(202) 646-5172

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

Norman H. Mayor, Jr. Clerk
CLERK

7-31-00
DATE

/s/ [illegible]
(BY) DEPUTY CLERK

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

[Filed JUL 31, 2000]

Case No. 00-1268-A

NOTRA TRULOCK, III
6616 Midhill Place
Falls Church, Virginia 22043

and

LINDA CONRAD
6616 Midhill Place
Falls Church, Virginia 22043

Plaintiffs,

vs.

LOUIS FREEH,
in his personal capacity,
c/o The Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, DC 20535,

and

NEIL GALLAGHER,
in his personal capacity,
c/o The Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, DC 20535,

and

STEVE DILLARD,
in his personal capacity,
c/o The Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, DC 20535,

and

BRIAN HALPIN,
in his personal capacity,
c/o The Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, DC 20535,

and

STEVE CARR,
in his personal capacity,
c/o The Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, DC 20535,

and

JANE DOE NO.1
in her personal capacity,
c/o The Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, DC 20535,

Defendants.

COMPLAINT

This is an action to redress violations of the First and Fourth Amendments to the U.S. Constitution.

PARTIES

1. Mr. Notra Trulock, III is a citizen of Commonwealth of Virginia and resides at 6616 Midhill Place, Falls Church, Virginia 22043.

2. Ms. Linda Conrad is a citizen of the Commonwealth of Virginia and resides at 6616 Midhill Place, Falls Church, Virginia 22043.

3. Defendant Louis Freeh is the Director of the Federal Bureau of Investigation ("FBI"). He is being sued in his personal capacity, while acting under color of federal authority. His address is c/o The Federal Bureau of Investigation, 935 Pennsylvania Avenue, N.W., Washington, DC 20535.

4. Defendant Neil Gallagher is the FBI's Assistant Director for National Security. He is being sued in his personal capacity, while acting under color of federal authority. His address is c/o The Federal Bureau of Investigation, 935 Pennsylvania Avenue, N.W., Washington, DC 20535.

5. Defendant Steve Dillard is the FBI's Inspector in Charge of a task force of FBI Special Agents and analysts investigating the theft and compromise of U.S nuclear secrets. He is being sued in his personal capacity, while acting under color of federal authority. His address is c/o The Federal Bureau of Investigation, 935 Pennsylvania Avenue, N.W., Washington, DC 20535.

6. Defendant Brian Halpin is a Special Agent of the FBI. He is being sued in his personal capacity, while acting under color of federal authority. His address is c/o The Federal Bureau of Investigation, 935 Pennsylvania Avenue, N.W., Washington, DC 20535.

7. Defendant Steve Carr a Special Agent of the FBI. He is being sued in his personal capacity, while acting under color of federal authority. His address is c/o The Federal Bureau of Investigation, 935 Pennsylvania Avenue, N.W., Washington, DC 20535

8. Defendant Jane Doe No. 1 is a Special Agent and computer specialist for the FBI. She is being sued in her personal capacity, while acting under color of federal

authority. Her address is c/o The Federal Bureau of Investigation, 935 Pennsylvania Avenue, N.W., Washington, DC 20535.

JURISDICTION AND VENUE

9. Jurisdiction over this matter is proper under 28 U.S.C. § 1331, as Plaintiffs assert claims arising under the laws of the United States.

10. Venue is proper in this district pursuant to the provisions of 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims herein occurred in the Eastern District of Virginia.

STATEMENT OF FACTS

11. From 1994 to 1998, Plaintiff Trulock served as the Director of the Office of Intelligence for the U.S. Department of Energy ("DOE"). From 1995 to 1998, he also served as Director of the Office of Counterintelligence for DOE. Plaintiff Trulock was thus responsible for the management of all intelligence and counterintelligence activities within DOE and at DOE laboratories during this time period.

12. Plaintiff Trulock is also a whistleblower who, in 1998, told the truth about the failure of the Clinton-Gore White House, the DOE, the FBI, and the Central Intelligence Agency ("CIA") to safeguard U.S. nuclear secrets.

13. Between 1995 and 1998, Plaintiff Trulock, as Director of Intelligence and Director of Counterintelligence for DOE, uncovered substantial, credible, and startling evidence that Chinese spies had penetrated U.S. nuclear weapons laboratories, including Los Alamos Nuclear Laboratory in Los Alamos, New Mexico, and stolen the know-how to produce every nuclear weapon in the U.S. arsenal, including the W-88 thermonuclear warhead. A U.S. Intelligence Community Damage Assessment, completed in 1999, largely validated Plaintiff Trulock's conclusions. In the interim,

however, Plaintiff Trulock's repeated warnings about these obviously substantial breaches of national security were often blocked by top DOE officials, and were otherwise ignored if not disregarded by the Clinton-Gore White House, the FBI and the CIA.

14. DOE also had an obligation to inform Congress' intelligence committees, however, and Congress was concerned greatly about Plaintiff Trulock's findings. Plaintiff Trulock testified before Congress on several occasions in 1998.

15. In the aftermath of the political fallout that resulted, and which continues to date, Plaintiff Trulock was demoted within DOE in 1998, then forced out entirely in 1999. He subsequently found employment with TRW, Inc.

16. Early this year, Plaintiff Trulock decided to write a "personal reflections-type" manuscript about his experiences, including his criticisms of the Clinton-Gore White House, the DOE, the FBI and the CIA for their mishandling and cover-up of the Chinese spy threat, as well as the compromise of national security at U.S. nuclear weapons laboratories, including Los Alamos. Plaintiff Trulock took painstaking care not to include any classified information in the manuscript and, in March 2000, sent the document to DOE for a security review before trying to have the manuscript published. DOE declined to review the manuscript. Plaintiff Trulock also submitted to, and passed, a polygraph examination intended to reveal any disclosure of classified information.

17. *National Review* decided to publish an article by Plaintiff Trulock, excerpted from the manuscript, in its July 31, 2000 edition. The article, entitled "Energy Loss," was actually in circulation by early July 2000.

18. At or about the same time, Plaintiff Trulock was fired by TRW, Inc., on information and belief, under pressure from high-ranking officials at DOE.

19. Plaintiff Conrad is the Executive Assistant to the Director of the Office of Intelligence at DOE. She has held this position for six (6) years and has been in government service for twenty five (25) years.

20. Plaintiff Conrad and Plaintiff Trulock share a townhouse in Falls Church, Virginia. Plaintiff Conrad is Plaintiff Trulock's landlord. Plaintiff Trulock rents a bedroom in the townhouse from Plaintiff Conrad, and they share the common portions of the townhouse.

21. Plaintiff Conrad and Plaintiff Trulock also share a computer, which is located in Plaintiff Conrad's bedroom. However, Plaintiff Conrad and Plaintiff Trulock each have multiple passwords for their respective personal computer files. They do not know each other's passwords. Plaintiff Conrad and Plaintiff Trulock do not and cannot access each other's personal computer files.

22. When Plaintiff Conrad arrived at work on Friday, July 14, 2000, her supervisor, Lawrence Sanchez, who is the Director of the Office of Intelligence at DOE, relayed to Plaintiff Conrad, on behalf of the FBI, that the FBI wanted to question her about Plaintiff Trulock and that they had a search warrant for her and Plaintiff Trulock's home. Sanchez also relayed to Plaintiff Conrad, on behalf of the FBI, that not only did the FBI have a search warrant for her home, but that if she did not agree to cooperate, they would break down her front door to execute the warrant, that the media would be present, and that the local police had already been alerted to the fact that the search was about to take place.

23. Plaintiff Conrad became extremely upset. She was very scared and began to shake. She broke down in tears, and remained extremely upset and in tears all day.

24. Throughout the day, Sanchez had several telephone calls with FBI Assistant Director for National Security Neil Gallagher and FBI Inspector in Charge Steve Dillard, who is the head of the FBI's Chinese espionage investigation task force, to discuss the interrogation of Plaintiff Conrad and the search of her and Plaintiff Trulock's home. DOE Secretary Bill Richardson even contacted FBI Director Louis Freeh to discuss the interrogation and search.

25. The FBI insisted on going forward with complete interrogation of Plaintiff Conrad and a search of her and Plaintiff Trulock's home, with or without Plaintiff Conrad's cooperation.

26. Sanchez, who had received a "dressing down" by Clinton-Gore White House Chief of Staff John Podesta for having been too cooperative with congressional investigations into the Chinese espionage matter, pressured Plaintiff Conrad to cooperate with the FBI.

27. At approximately 4:00 p.m., Agents Halpin and Carr, acting, on information and belief, under the direction, instruction and orders of FBI Director Freeh, FBI Assistant Director Gallagher, and Inspector in Charge Dillard, arrived at DOE to interrogate Plaintiff Conrad, who remained extremely intimidated and fearful, and had been crying all day.

28. On information and belief, Agents Halpin and Carr were armed. They took Plaintiff Conrad into a conference room at DOE, closed the door, and began to interrogate her.

29. Plaintiff Conrad continued to be extremely intimidated and fearful, and remained extremely intimidated and fearful throughout the interrogation. She was crying and shaking, and continued to do so throughout the interrogation.

30. Agents Halpin and Carr asked Plaintiff to sign a piece of paper, which she did. She did not read the paper however, and does not know what was written on the paper.

31. Plaintiff Conrad would not have signed the paper, or agreed to cooperate in any way, if she had not been told that the FBI had a search warrant for her and Plaintiff Trulock's home, and that the FBI would break down the front door and search her and Plaintiff Trulock's home, in the presence of the media and the local police, if she did not cooperate.

32. At no point was Plaintiff Conrad ever advised of her constitutional rights, or that she did not have to consent to the interrogation or the search of her home.

33. No one else was present during the interrogation, although at one point Plaintiff Conrad's supervisor entered the conference room and spoke briefly with Agent Carr.

34. During the interrogation, Agents Halpin and Carr questioned Plaintiff Conrad about the manuscript from which Plaintiff Trulock's article was excerpted, as well as about persons with whom Plaintiff Trulock was in contact, meetings that Plaintiff Trulock may have had, and Plaintiff Trulock's telephone habits among other subjects.

35. During the interrogation, Agents Halpin and Carr also questioned Plaintiff Conrad about Plaintiff Trulock's personal records and computer files. Plaintiff Conrad told Agents Halpin and Carr that she and Plaintiff Trulock share a computer, which is located in Plaintiff Conrad's bedroom. Plaintiff Conrad also told Agents Halpin and Carr that both she and Plaintiff Trulock maintain separate, personal files on the computer's hard drive, but that she did not know what information Plaintiff Trulock keeps in his personal files on the computer hard drive. Plaintiff Conrad also told Agents Halpin and Carr that she and Plaintiff Trulock had multiple passwords for their respective personal computer files, that

they did not know each other's passwords, and that they did not, and could not, access each others personal computer files.

36. Agent Halpin and Agent Carr were particularly interested in the fact that Plaintiff Trulock maintained personal files on the computer's hard drive. Agent Halpin, who had told Plaintiff Conrad that he is a lawyer, then made a telephone call to his supervisor, Inspector in Charge Dillard, who also is a lawyer. Plaintiff Conrad overheard Agent Halpin discussing with Inspector in Charge Dillard the fact that Plaintiff Trulock maintained personal files on the computer's hard drive.

37. During her interrogation, Plaintiff Conrad was not allowed to make any telephone calls. Plaintiff Conrad was able to receive two (2) telephone calls, however, one from her daughter and one from Plaintiff Trulock. However, the agents would not let Plaintiff Conrad take either telephone call in private, but instead listened in on Plaintiff Conrad's side of each conversation. Plaintiff Conrad was too upset to speak with her daughter. Plaintiff Trulock could tell from Plaintiff Conrad's tone of voice and manner that she was extremely upset, but Plaintiff Conrad had been forbidden by Agents Halpin and Carr from telling Plaintiff Trulock what was happening to her.

38. The interrogation lasted from approximately 4:00 p.m. to 7:15 or 7:30. When the interrogation was over, Agents Halpin and Carr told Plaintiff Conrad that she was not allowed to tell anyone about what had occurred during the interrogation.

39. At no point during the three and a half hour interrogation did Plaintiff Conrad feel that she was free to leave. To the contrary, she felt that she was under arrest.

40. At no point did Plaintiff Conrad freely and voluntarily consent to her seizure and interrogation by Agents Halpin and

Carr, nor did she freely and voluntarily consent to the search and/or seizure of her home, the computer she shares with Plaintiff Trulock, and/or the password-protected personal files on the computer's hard drive. Rather, Plaintiff Conrad merely acquiesced to the agents' claim of lawful authority and/or was coerced by threats that, if she failed to cooperate, the FBI would break down her door and search her and Plaintiff Trulock's home, in the presence of the media and local police.

41. At no point did Agents Halpin and Carr ever show Plaintiff Conrad a search warrant, nor, on information and belief, was a warrant ever issued.

42. Agents Halpin and Carr then followed Plaintiff Conrad home. When Plaintiff Conrad entered the home, the agents entered immediately behind her. On information and belief, the agents were armed when they entered Plaintiffs' home.

43. Plaintiff Trulock was home at the time. He asked to see the agents' search warrant. The agents replied that Plaintiff Conrad had consented to a search, even though she had given no such consent, but merely acquiesced to a claim of lawful authority and/or was otherwise coerced by the agents.

44. At all times, Plaintiff Trulock had a reasonable expectation of privacy in his password-protected computer files. Plaintiff Conrad and Plaintiff Trulock were the only persons who had regular access to the computer. Plaintiff Conrad and Plaintiff Trulock understood that they each maintained separate, password-protected, personal files on the computer, but that they would not, and did not, know each other's passwords. Plaintiff Conrad and Trulock also understood that they would not, and could not, access each other's personal files on the computer's hard drive. Consequently, Plaintiff Conrad lawfully could not, and did

not, consent to a search of Plaintiff Trulock's password-protected personal files on the computer's hard drive.

45. Like Plaintiff Conrad, Plaintiff Trulock acquiesced to the agents' claim of lawful authority and/or was otherwise coerced by the agents. At no point did Plaintiff Trulock freely and voluntarily consent to the search and/or seizure of his home, the computer he shares with Plaintiff Conrad, and/or the password-protected personal files he maintains on the computer's hard drive.

46. At no point was Plaintiff Trulock ever advised of his constitutional rights, or that he did not have to consent to the search of his home, the computer he shared with Plaintiff Conrad or the password-protected personal files he maintained on the computer's hard drive.

47. Upon entering the home, Agent Carr immediately asked Plaintiff Conrad to show her the computer that she and Plaintiff Trulock shared. Plaintiff Conrad took Agent Carr upstairs to the bedroom where the computer was located. Agent Cart asked Plaintiff Conrad to return downstairs and to wait with Plaintiff Trulock and Agent Halpin. After approximately fifteen to twenty minutes, Agent Carr returned downstairs. On information and belief, Agent Carr accessed and secured the contents of the computer's hard drive, including Plaintiffs' password-protected personal computer files, during this time period.

48. Agents Halpin and Carr then began interrogating Plaintiff Trulock. The interrogation lasted for approximately one half hour, during which the agents asked Plaintiff Trulock whether there was any classified material in the home, whether any classified material was on the computer, whether he had sent the manuscript of the article to other persons, and whether he downloaded e-mail onto a palm pilot, among other questions. Again, at no point did the agents ever advised Plaintiff Trulock of his constitutional rights.

49. During the interrogation of Plaintiff Trulock, a third agent, an FBI computer specialist who did not identify herself to Plaintiff Conrad and Plaintiff Trulock, arrived at the home. The computer specialist sat silently on the couch during the remainder of the interrogation.

50. After the interrogation of Plaintiff Trulock, Agent Carr and the computer specialist went upstairs to the bedroom where the computer was located, where they again accessed and began to search the contents of the computer's hard drive.

51. Plaintiff Conrad was asked to come upstairs to the bedroom, where she was asked to identify certain, but not all, of her personal bank records on the computer's hard drive. The computer specialist copied these bank records onto a diskette, and gave the diskette to her. Plaintiff Conrad was then told to return downstairs.

52. Plaintiff Trulock was then asked to come upstairs to the bedroom. Plaintiff Trulock observed that the computer specialist had accessed the computer's hard drive through its "DOS" directories. The computer specialist told Plaintiff Trulock that the hard drive had been "locked down."

53. Plaintiff Trulock was then asked to identity certain, but not all, of his personal bank records on the computer's hard drive. The computer specialist copied these bank records onto a diskette, and gave the diskette to him. Plaintiff Trulock was then told to return downstairs.

54. Agent Carr and the computer specialist remained in the bedroom, apparently searching computer files, for approximately one and a half hours.

55. While Agent Carr and the computer specialists were searching Plaintiffs' computer files, Agent Halpin remained downstairs with Plaintiffs. At one point, Plaintiffs and Agent Halpin began to discuss dogs. Agent Halpin had commented on the fact that Plaintiff Trulock had a golden retriever, and

told Plaintiffs that he also had a golden retriever. Plaintiffs did not think anything of the conversation at the time. Although Agent Halpin had a cell phone with him he asked Plaintiffs if he could use the telephone. Agent Halpin then took a cordless telephone belonging to Plaintiff Conrad, went outside where he could not be overheard by Plaintiffs and made what appeared to be a long telephone call.

56. After Agent Carr and the computer specialist finished searching the computer, they told Plaintiffs that they would have to take the computer hard drive with them. They gave Plaintiffs a receipt for the hard drive, but left the monitor, printer and accessories.

57. At no time during or after the search did the agents ever show Plaintiffs Trulock and Conrad a search warrant, nor did they leave a copy of the search warrant with them.

58. On information and belief, no such warrant existed, nor would the FBI have had probable cause to obtain a warrant, because DOE had declined to review the manuscript before Plaintiff Trulock sought to have it published, and because Plaintiff Trulock also submitted to, and passed, a polygraph examination intended to reveal any disclosure of classified information, and because DOE had made no criminal referral to the FBI regarding the manuscript.

59. In fact, Secretary Richardson has since admitted to Congressman Dan Burton, Chairman of the U.S. House of Representatives Government Reform Committee, that DOE had made no criminal referral to the FBI which would have been necessary for the FBI to even commence an investigation.

60. CIA Director George Tenant has since admitted to Chairman Burton, in reference to the search and seizure of Plaintiffs home, that "it looked like somebody has been wronged."

61. On Monday, July 17, 2000, several reports appeared in the media about the FBI's search and seizure of Plaintiffs' home.

62. On Tuesday, July 25, 2000, eight days after reports had appeared in the media about the FBI's search and seizure of Plaintiff's home, and only a few days after Plaintiffs sought legal representation about this matter, Plaintiffs' home was broken into. While there were no visible signs of entry and nothing appeared to have been taken, it was obvious to Plaintiffs that someone had rifled through a collection of digital video disks, videotapes, photo albums and books and other items kept in the same bedroom where the computer had been kept before it was seized by the agents. In addition, Plaintiff Trulock's golden retriever, the same dog that Plaintiffs had discussed with Agent Halpin, had been injured. The dog had a gash in his head, approximately one inch long, there he was struck with a blunt object, such as the butt of a gun. A report of the incident was made to the local police, who termed the incident "suspicious."

63. Included among the personal password-computer files on the hard drive searched and seized by the FBI, and to which Plaintiffs are being deprived access, is personal banking, billing, checking, financial and tax information, for a consulting business upon which Plaintiff Tulock relies to earn a living, and approximately one year's worth of research by Plaintiff Trulock concerning a genetic disorder from which his son suffers.

64. Thus, as a direct and proximate result of the unlawful seizure of Plaintiff Conrad, and the unlawful search and/or seizure of Plaintiffs' home, computer hard drive, and personal computer, Plaintiffs Trulock and Conrad have suffered loss of income, loss of personal property, emotional distress, loss of reputation, and invasion of privacy, among other substantial damages.

65. On July 28, 2000, Plaintiffs sent a letter to FBI Director Freeh, by facsimile and hand delivery, raising these obvious violation of Plaintiffs' civil rights and requesting a conference to try to resolve them. The letter stated:

> As you may know, Judicial Watch has been retained to represent Notra Trulock and Linda Conrad, Mr. Trulock's landlord. Based upon our investigation, we have determined that you and your agents have violated the civil rights of Mr. Trulock and Ms. Conrad in undertaking an unconstitutional search and seizure of their home and computer and other illegal acts. Our investigation shows that you, personally, are involved, particularly given the importance of this matter and the media and Congressional attention which it his generated. It was Mr. Trulock who, not coincidentally, blew the whistle on the Clinton-Gore Administration's, the Energy Department's, the Justice Department's, the CIA's, and the FBI's coverup of the unprecedented breach of national security nuclear secrets at Los Alamos, which now threatens the lives of all Americans.
>
> Before filing suit against you and your agents, we are willing to discuss a resolution of this matter. If you are interested, a meeting or conference call must be set up today, since Mr. Trulock and Ms. Conrad continue to be harassed and/or smeared by you and your agents. Just recently for instance, their home was broken into and Mr. Trulock's dog attacked and harmed. It is likely that FBI officials have been responsible for, or complicit in, this as well. If we do not hear from you today, Judicial Watch is authorized to immediately file suit on various grounds.
>
> Thank you for the courtesy of an immediate response.

66. FBI Director Freeh's secretary confirmed receipt of the letter on July 28, 2000, and stated that she would

personally deliver it to the Director. However, neither FBI Director Freeh nor anyone from his office responded to Plaintiffs' letter.

67. That same day, July 28, 2000, Plaintiff Conrad's supervisor, Director Sanchez, told Plaintiff Conrad that he had tried to keep her out of this matter but that, if she went forward with a lawsuit, he would deny telling her the FBI told him it had a search warrant for her home. Director Sanchez also told Plaintiff Conrad that he would do this in order to protect "the Bureau," that she would be "branded" forever, that he could not take her with him to his next assignment at the Central Intelligence Agency, and that her career would be ruined.

COUNT I
(Fourth Amendment Violations)

68. Plaintiffs reallege paragraphs 1 through 67 as if fully set forth herein.

69. Plaintiffs enjoy the right to be free from unreasonable searches and seizures, as guaranteed by the Fourth Amendment to the United States Constitution.

70. Defendants, acting under color of federal authority, violated Plaintiff Conrad's Fourth Amendment rights by seizing Plaintiff Conrad and interrogating her for approximately two and a half hours on July 14, 2000 in a sealed conference room at her office, under threat of breaking down her door and searching her home, in the presence of the media and the local police, if she failed to cooperate.

71. Defendants, acting under color of federal authority, also violated the Fourth Amendment rights of Plaintiffs Conrad and Trulock by searching Plaintiffs' home, computer and computer files, and by seizing Plaintiffs' computer and computer files without probable cause, a valid search warrant, the voluntary, uncoerced consent of Plaintiffs, and/or other legal justification.

72. Defendants acted knowingly, willfully and/or maliciously, and with the specific intent to deprive Plaintiffs of their constitutional rights and/or with deliberate indifference to Plaintiffs' constitutional rights.

73. As a direct and proximate result of the violation of Plaintiffs' constitutional rights, Plaintiffs suffered substantial damages.

WHEREFORE, Plaintiffs demand judgment be entered against Defendants, jointly and severally, including an award of compensatory damages, punitive damages, reasonable attorneys fees, pre-judgment interest, post-judgment interest, costs and such other relief as the Court deems just and proper.

COUNT II
(First Amendment Violations)

74. Plaintiffs reallege paragraphs 1 through 73 as if fully set forth herein.

75. Plaintiff Trulock enjoys the rights of freedom of expression as guaranteed by the First Amendment to the United States Constitution.

76. Defendants, acting under color of federal authority, violated Plaintiff Trulock's First Amendment rights by retaliating against Plaintiff Trulock for publishing an article in the July 31, 2000 edition of *National Review* and by attempting to prevent Plaintiff Trulock from continuing to exercise his First Amendment rights. Defendants retaliated against Plaintiff Trulock and attempted to prevent him from exercising his First Amendment rights by unlawfully seizing and interrogating Plaintiff Conrad, conducting an unlawful search of Plaintiff Trulock's computer files, and unlawfully seizing Plaintiff Trulock's computer files.

77. Defendants acted knowingly, willfully and/or maliciously, and with the specific intent to deprive Plaintiff of

his constitutional rights, and/or with deliberate indifference to Plaintiff's constitutional rights.

78. As a direct and proximate result of the violation of his constitutional rights, Plaintiff Trulock suffered substantial damages.

WHEREFORE, Plaintiff Trulock demands judgment be entered against Defendants, jointly and severally, including an award of compensatory damages, punitive damages, reasonable attorneys fees, pre-judgment interest, post-judgment interest, costs and such other relief the Court deems just and proper.

Plaintiff demands trial by jury on all issues so triable.

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Supreme Court, U.S.
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02-443

No.

In The
Supreme Court of the United States

LOUIS FREEH, *et al.*,

Petitioners,

v.

NOTRA TRULOCK, III, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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20 pp

QUESTION PRESENTED

1. Whether the U.S. Court of Appeals for the Fourth Circuit correctly applied well-established precedent regarding a claim of retaliation for the exercise of First Amendment rights and qualified immunity for public officials.

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STATEMENT OF THE CASE

Respondent Notra Trulock, III ("Trulock"), is the former Director of the Office of Intelligence for the Department of Energy ("DOE"). Appendix to Petitioners' Br. ("Pet'r App.") at 48a. Respondent Linda Conrad ("Conrad") was Trulock's former Executive Assistant and currently is the Executive Assistant to Lawrence Sanchez ("Sanchez"), the current Director of Intelligence at DOE. Pet'r App. 50a. Respondents shared a Falls Church, Virginia townhouse and computer located there. *Id.*

When Trulock was Director of the Office of Intelligence for the DOE, he uncovered substantial, credible evidence that Chinese espionage agents had penetrated the U.S. nuclear weapons laboratories, including Los Alamos National Laboratory, and had stolen U.S. nuclear weapons secrets including, but not limited to, the design of the W-88 thermonuclear warhead. Pet'r App. 48a. A U.S. Intelligence Community Damage Assessment, completed in 1999, largely validated Trulock's conclusions. *Id.*

In the interim, however, Trulock gave repeated warnings to The White House, Federal Bureau of Investigation ("FBI"), and Central Intelligence Agency ("CIA") about these substantial breaches of national security, but these warnings were ignored. Pet'r App. 49a. In early 2000, Trulock decided to write a "personal reflections-type" manuscript describing his frustrating experiences as a "whistleblower." *Id.* This manuscript included criticism of the White House, FBI and CIA for their mishandling and cover-up of the Chinese spy threat, as well as the compromise of national security at the nuclear weapons laboratories. *Id.*

Trulock took painstaking care not to include any classified information in the manuscript and, in March 2000, sent the document to DOE for a security review before trying to have the manuscript published. *Id.* DOE, however, declined to review the manuscript. Trulock also submitted to, and passed, a polygraph examination intended to reveal any disclosure of classified information. *Id.*

National Review decided to publish an article by Trulock, excerpted from his manuscript, in its July 31, 2000 edition. *Id.* The article, entitled "Energy Loss," was in circulation by early July 2000, prior to the FBI's retaliatory search and seizure that violated Trulock's First Amendment rights. *Id.* Shortly after this article was in circulation, on July 14, 2000, Conrad was confronted by Director Sanchez, her supervisor, at work. Pet'r App. 50a. Director Sanchez, purporting to act on behalf of the FBI, told her that the FBI wanted to question her about Trulock and that they had a search warrant to search her townhouse that she shared with Trulock. *Id.* In fact, the FBI had no search warrant for Conrad's townhouse.

Director Sanchez, still purporting to act on behalf of the FBI, further told Conrad that if she did not cooperate with the FBI, they would break down her front door to execute the warrant, that the media would be present, and that the police had been alerted to the fact that the search was about to take place. Pet'r App. 50a. In fact, none of this was true. Believing what Director Sanchez had told her was true, Conrad became extremely upset and scared, and began to shake. She broke down in tears and remained extremely upset and in tears all day. *Id.*

Throughout the day, Director Sanchez had several telephone calls with FBI Assistant Director for National

Security Neil Gallagher and FBI Inspector in Charge Steve Dillard, who is the head of the FBI's Chinese espionage investigation task force, to discuss the interrogation of Conrad and search of her and Trulock's home. Pet'r App. 51a. DOE Secretary Richardson even contacted FBI Director Louis Freeh to discuss the interrogation and search. *Id.*

Despite the DOE's obvious complicity in the retaliatory search, DOE had made no criminal referral to the FBI regarding Trulock's manuscript, as DOE Secretary Bill Richardson later admitted to Congressman Dan Burton, Chairman of the House of Representatives Government Reform Committee. *Id.* At approximately 4:00 p.m. on July 14, 2000, FBI Agents Brian Halpin ("Halpin") and Steve Carr ("Carr"), acting under the direction, instruction and orders of FBI Director Louis Freeh, FBI Assistant Director Gallagher and FBI Inspector in Charge Dillard, arrived at DOE headquarters, led Conrad to a conference room, closed the door and began to interrogate her. *Id.* The interrogation lasted until 7:15 p.m. or 7:30 p.m. Pet'r App. 53a. During the interrogation, Conrad was not allowed to make any out-going telephone calls. *Id.* Although she was permitted to receive two telephone calls, the two FBI agents did not allow Conrad to take these calls in private but, instead, the agents listened in on Conrad's side of the conversation. *Id.*

Throughout the interrogation, Conrad was visibly upset and fearful. Pet'r App. 50a. While Conrad was visibly upset, Agents Halpin and Carr presented her with a piece of paper to sign. *Id.* at 52a. Halpin and Carr never advised Conrad of her constitutional rights or that she did not have to consent to the interrogation or the subsequent search. *Id.* Believing that the FBI had a search warrant, as Director Sanchez had falsely told her, and that the FBI would break down the door to her home

in the presence of the media and police if she did not cooperate, as Director Sanchez also had falsely told her, she signed the piece of paper without reading it and without knowing what was written on it. *Id.*

After Halpin and Carr had finished their interrogation of Conrad, they followed her to her home and immediately followed her into her home. Pet'r App. 54a. Trulock was present when the agents entered the home. *Id.* He asked to see the agents' search warrant. *Id.* The agents stated that they did not have a search warrant and that Conrad had consented to their search of the computer he shared with Conrad and on which he maintained his private files separate and password-protected from Conrad's files. *Id.* Trulock was never advised of his constitutional rights nor did he freely or voluntarily give his consent to the search of his home or his files maintained on the computer he shared with Conrad. Pet'r App. 55a. Conrad and Trulock understood that they would not, and could not, access each other's personal files on the computer's hard drive. *Id.* at 54a.

With the assistance of an FBI computer specialist, Halpin and Carr accessed Trulock's personal password-protected files and seized them by taking the computer's hard drive. *Id.* at 56a. The computer's hard drive – which was just recently returned to Respondents after being held for more than two years – contained personal banking, billing, checking, financial and tax information, and approximately one year's worth of research by Trulock concerning a genetic disorder from which his son suffers. *Id.* at 58a.

CIA Director George Tenet has since admitted to Chairman Dan Burton, in reference to the retaliatory search and seizure here, that "it looked like somebody has been

wronged." *Id.* at 57a. On July 28, 2000, Respondents' attorneys sent a letter to FBI Director Freeh, by facsimile and hand delivery, asserting that the FBI had violated Trulock's and Conrad's civil rights and requesting a conference to try to resolve them and avoid the necessity of a lawsuit. *Id.* at 59a. Despite confirmation of the FBI's receipt of this letter, neither Freeh nor anyone else from his office ever responded to this letter. *Id.* at 60a.

On the same day, July 28, 2000, Director Sanchez told Conrad that if she proceeded with a lawsuit, he would deny telling her the FBI told him it had a warrant to search her home. *Id.* Director Sanchez also told Conrad that he would make his denial to protect the "Bureau," that she would be "branded" forever, and that her career would be ruined. *Id.*

Subsequently, the district court dismissed Trulock's First Amendment retaliation claim, as well as Respondents' Fourth Amendment claims. Order and Memorandum Opinion (September 22, 2000). Pet'r App. 37a-42a. The U.S. Court of Appeals for the Fourth Circuit ("Court of Appeals") reversed the district court as to the First Amendment claim, finding that more than sufficient facts had been alleged for the case to proceed. *Trulock v. Freeh*, 275 F.3d 391 (4th Cir. December 28, 2001). Pet'r App. 37a.-42a. The Court of Appeals subsequently denied Petitioners' motion for rehearing and rehearing *en banc*. 289 F.3d 829; Pet'r App. 1a-3a.

Petitioners sought and received from this Court an extension of time to file a petition for a writ of certiorari, apparently to allow the Solicitor General additional time to assess whether such a petition was warranted. After the Solicitor General declined the opportunity to bring this case,

Petitioners obtained new counsel and filed a petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

The Court should decline to grant the petition for a writ of certiorari ("Petition") because: (1) the Court of Appeals' decision is fully consistent with the decisions of this Court relating to suits against federal officers in their personal capacity, articulated most recently in *Crawford-El* v. *Britton*; and (2) no significant split exists between the federal Courts of Appeals regarding the elements of a First Amendment retaliation claim. Accordingly, the Petition should be denied.

I. THE COURT OF APPEALS' DECISION IS FULLY CONSISTENT WITH THIS COURT'S RECENT DECISION IN *CRAWFORD-EL V. BRITTON.*

Petitioners argue that the Court of Appeals disregarded the pleading requirements for actions against federal officials in their personal capacities. According to Petitioners, the Court of Appeals supposedly held that "Respondents need not allege any factual basis" for a First Amendment retaliation claim, that only a "*mere inference*" that a constitutional violation occurred was necessary. Pet'r Br. at 8 (emphasis in original). This is simply not what the Court of Appeals did or held. *See* 275 F.3d at 405.

The Court of Appeals' decision relies exactly on the kind of "specific, non-conclusory factual allegations" recommended by this Court in *Crawford-El v. Britton*, 523 U.S. 574 (1998) ("*Crawford-El*"). The Court of Appeals correctly recounted the following specific facts alleged in the Complaint:

i. Trulock's article was published in early July;
ii. The article was highly critical of the White House, the CIA, the DOE, and the FBI, the agency that executed the search;
iii. The search of Trulock's home occurred on July 14;
iv. No criminal referral was issued by DOE for the FBI to begin an official investigation;[1]
v. Sanchez told Conrad, on behalf of the FBI, that there was a search warrant when none existed; and
vi. Sanchez later told Conrad that, if she initiated a lawsuit, he would deny telling Conrad that the FBI claimed to have a search warrant in order to protect the "Bureau."

Pet'r App. 19a-20a.[2]

Based on these facts (accepted as true and viewed together), the Court of Appeals decided that it "could not conclude beyond all doubt that Trulock can prove no set of facts in support of his claim [of retaliation] that would entitle him to relief." Pet'r App. 20a. The only "inference" drawn by the Court of Appeals – again when assuming all these facts were true – was clearly based on these six specific and non-conclusory allegations in the Complaint. Thus Petitioners are

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[1]Petitioners argue for the first time that a criminal referral may not have been required in this particular circumstance. Pet'r Br. 13 n.6. This is a factual matter that should have been raised at earlier stage.

[2]The Complaint, of course, alleges numerous additional significant facts. In particular, the high-level contacts between DOE and the FBI to discuss the interrogation and the search will establish that the retaliation against Trulock extended to the highest levels of the government.

simply in error when they assert that the Court of Appeals' decision was based on a "mere" inference.

The numerous and detailed facts contained in the Complaint more than adequately allege a causal link between Trulock's publication of his article and the almost immediate retaliation by Petitioners. Petitioners note that this Court's recent decision in *Crawford-El* extensively examined the issue of qualified immunity for public officials. The opinion in *Crawford-El* stands for the proposition that no special pleading rules exist in cases of constitutional claims alleging improper motive. *Crawford-El*, 523 U.S. at 597. Thus, under *Crawford-El*, Respondents' Complaint more than satisfies the traditional pleading requirement that a complaint "give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Consistent with this Court's rulings, the Court of Appeals appropriately reviewed Respondents' Complaint to determine whether it was clear that no relief could be granted under any set of facts consistent with the allegations. *Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984). The Court of Appeals found that the Complaint stated a claim for retaliation when it appropriately accepted "the material facts alleged in the complaint as true and construe[d] all *reasonable inferences* in the plaintiff's favor." *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994) (emphasis added). At each step, the Court of Appeals followed the procedure consistent with this Court's decision in *Crawford-El*.

Petitioners also contend that, by "substituting its judgment for that of the district court," the Court of Appeals erred regarding the sufficiency of Respondent's claim. Pet'r Br. at 9. Petitioners cite *Crawford-El* concerning the discretion to be afforded to district courts regarding "management of the

factfinding process" to argue that the Court of Appeals should have deferred to the legal judgment of the district court. Petitioners quote *Crawford-El* completely out of context as *Crawford-El* is only referring to district courts' experience managing discovery, not their expertise evaluating the legal sufficiency of claims. *Crawford-El* nowhere states that appellate courts should defer or subordinate their legal judgment to that of district courts in First Amendment retaliation cases. 523 U.S. at 600-601. In their own brief to the Court of Appeals, Petitioners argued that an appellate court's standard of review for a district court's ruling is "de novo." *See* Brief for Appellees at 10. Thus it is curious, and incorrect, that Petitioners now argue that the Court of Appeals "inappropriately" substituted its judgment for the district courts'.

Petitioners also suggest that the Court of Appeals' decision may indicate confusion over the application of *Crawford-El*, and that a failure by this Court to grant certiorari and clarify *Crawford-El* "will spawn confusion in the lower courts." Pet'r Br. at 14. Petitioners do not cite any examples of other appellate or district court cases in which courts struggle to interpret *Crawford-El* or state that its holdings are confusing. Petitioners do not assert that a split has emerged between various circuits in their interpretation of *Crawford-El*.

To the contrary, courts have understood and widely applied the holding in *Crawford-El*. For example, the Sixth Circuit recently examined and applied *Crawford-El* in a First Amendment retaliation case. *Goad v. Mitchell*, 297 F.3d 497 (6th Cir. 2002). In its opinion, the court emphasized that "specific, nonclusory allegations of fact that plaintiffs may be required to assert to establish improper motive need not

constitute direct evidence of improper motive." *Id.* at 505. In fact, the Sixth Circuit approvingly cited the Court of Appeals decision in this case for the proposition that facts that show "circumstantial evidence of improper intent" are sufficient to survive a motion to dismiss in a retaliation claim. *Id.*

Moreover, if this Court were to accept Petitioner's invitation to re-examine *Crawford-El* and heightened pleading requirements, it would be much more likely to create the confusion that Petitioners fear. Numerous courts have just recently abandoned heightened pleading requirements in reliance on *Crawford-El*. *See McCook v. Springer*, No. 01-2157, 2002 U.S. App. LEXIS 15875 (10th Cir. Aug. 5, 2002) ("We recently held that our heightened pleading requirement does not survive the Supreme Court's opinion *in Crawford-El v. Britton*" (citing *Patel v. Wooten*, 2001 U.S. App. LEXIS 15621, No. 00-1187 (10th Cir. July 12, 2001 overruling *Gehl v. Coby*, 63 F.3d 1528, 1535 (10th Cir. 1995); *Currier v. Doran*, 242 F.3d 905, 916 (10th Cir.), *cert. denied*, 122 S. Ct. 543 (2001) ("We conclude that this court's heightened pleading requirement cannot survive *Crawford-El*). Even if Petitioners were right that some part of *Crawford-El* needs to be clarified, this Court should wait until such an issue fully materializes. This case is not the appropriate vehicle for any such clarification. Hence, a writ of certiorari in this case is not warranted.

Finally, Petitioners quibble with the Court of Appeals' decision by stating that it did not specifically find that the Complaint alleged that Trulock's article was entitled to First Amendment protection. Pet'r Br. at 12. In fact, the Complaint clearly alleges that Trulock was entitled to First Amendment protection and that his First Amendment rights

were violated by retaliating for the publishing of the article. Pet'r App. 61a, ¶¶ 75-78.

II. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S DECISIONS ON QUALIFIED IMMUNITY.

Petitioners take issue with the Court of Appeals' analysis of Petitioners' qualified immunity defense, arguing that the court erred in finding sufficient specific and non-conclusory facts included in the Complaint. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001) (a court must consider: (1) whether the facts alleged show a violation of a constitutional right; and (2) whether it is clear that the conduct was unlawful in the situation).

As described in Section I., *supra*, the Complaint alleges ample specific and non-conclusory facts to establish a violation of a constitutional right. As the Court of Appeals correctly concluded, these facts allege a clear causal link between the publishing of the article and the FBI search.[3]

Petitioners argue that even if the Court of Appeals appropriately moved past the initial inquiry, it erred in determining that Trulock's constitutional right was clearly established. Petitioners assert that the Court of Appeals' finding that Petitioners were entitled to qualified immunity

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[3]Petitioners are perplexed by what they view as a discrepancy between the publication date of the article (July 31, 2000), and the date of the search (July 14, 2000). As alleged in the Complaint, the actual date the magazine became available is just days before the date of the FBI search. As Petitioners are probably aware, many periodicals are dated after the time that they become available in print. Thus, this factual matter has no bearing on the Petition at issue.

with respect to Respondents' Fourth Amendment claim is inconsistent with its finding that the FBI agents were not entitled to qualified immunity with respect to the First Amendment retaliation claim. This argument is without merit. The Court of Appeals' finding that Petitioners were entitled to qualified immunity with respect to the Fourth Amendment claim was premised on the conclusion that "a reasonable officer" in that position would not have known that a search of Trulock's password-protected computer files without his consent would violate clearly established law. 275 F.3d at 399. On the other hand, as to the First Amendment claim, any FBI agent reasonably would have known that a retaliatory search and seizure would violate clearly established law prohibiting such retaliation against an individual for speaking critically of the government. Importantly, this is true regardless of whether the search was legal or illegal, because it has long been clearly established that "[r]etaliation by a public official for the exercise of a constitutional right is actionable . . . even if the act, when taken for different reasons, would have been improper." *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274 (1977). The same factual allegations in the Complaint that create a reasonable inference of a retaliatory motive also are grounds for denying qualified immunity to the Petitioners here, because if the FBI agents had a retaliatory motive in executing the search, then, *ipso facto*, the FBI agents reasonably knew they were violating Trulock's First Amendment rights.

III. NO CONFLICT AMONG THE CIRCUITS JUSTIFIES GRANTING THE WRIT FOR CERTIORARI.

Petitioners claim that the Court of Appeals' decision regarding the elements of a First Amendment retaliation claim are in conflict with other federal Courts of Appeals. This claim does not justify the issuance of a writ for two reasons. First, the subject of the circuit split, the elements of a First Amendment retaliation claim, is not at issue in the present case. Second, the case law Petitioner cites does not indicate that a conflict actually exists.

The key issues before this Court involve the pleading requirements for a First Amendment retaliation claim, as governed by *Crawford-El*, and the application of the doctrine of qualified immunity. At no point have Petitioners argued the Court of Appeals adopted a flawed test to demonstrate a First Amendment retaliation claim. Petitioners also do not assert that the circuit split would have resulted in a different outcome had this case arisen in a different circuit. Moreover, Petitioners point to no evidence of confusion among the courts or unjust outcomes as a result of the alleged split.

Petitioners cite to several cases from different circuits to demonstrate that this alleged conflict exists. A thorough reading of these cases, however, demonstrates that no conflict exists. Most notably, Petitioners misstate and misuse the Fifth Circuit case *Keenan v. Tejeda*, 290 F.3d 252 (5th Cir. 2002) – Petitioners' primary evidence of the alleged circuit split. Pet'r Br. at 17-18. Keenan is used as evidence that the Fifth Circuit, along with the First, Second, and Fourth Circuits all share one version of a First Amendment retaliation claim. Petitioners claim that the Sixth, Ninth, and

Tenth Circuits share another version of what elements make up a First Amendment retaliation claim. Petitioners then suggest that by being a member of this former group of circuits, that the Fifth Circuit is "squarely in conflict with the holding of the Sixth, Ninth, and Tenth Circuits." Pet'r Br. 17-18. This is incorrect.

Keenan, in fact, is not squarely in conflict with any of the courts or cases Petitioners claim. In its decision, the Fifth Circuit states that "the settled law of other circuits, which we endorse, holds that to establish a First Amendment retaliation claim...[plaintiffs] must show that (1) they were engaged in constitutionally protected activity, (2) the defendants' actions caused then to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiff's constitutionally protected conduct." *Keenan*, 290 F.3d at 258. The second element articulated in *Keenan* is the same element articulated in the Sixth Circuit (*Bloch v. Ribar*, 156 F.3d 673, 681 (6th Cir. 1998)), the Ninth Circuit (*Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999)) and the Tenth Circuit (*Smith v. Plati*, 258 F.3d 1167, 1176 (10th Cir. 2001)). Petitioners' use of *Keenan* as evidence of a significant circuit split is clearly erroneous.

Moreover, a thorough reading of *Keenan* shows that no meaningful conflict exists as to the express language or to the outcome of the cases. As stated above, the Fifth Circuit utilized the "ordinary firmness" element in holding what the plaintiffs had to prove in a First Amendment retaliation claim. The *Keenan* court goes on to state that the second retaliation element "requires some showing that the plaintiffs' exercise of free speech has been curtailed." *Keenan*, 290 F.3d at 259.

By doing this, the Fifth Circuit effectively demonstrated that there is one test for retaliation claims and that test includes both objective and subjective factors. Whether articulated or not, each of the cases cited by Petitioners involve both objective and subjective elements. While the tests used by the courts in *Bloch*, *Mendocino* and *Smith* specifically refer to the "ordinary firmness", or objective element, each of those cases required specific, subjective evidence of retaliation. *See Bloch*, 156 F.3d at 681 (the release of the private details of the rape "damaged them by chilling their right to freely criticize a public official."), *Mendocino*, 156 F.3d at 1301-02 (the particular inmate's reputation and the guard's reason for punishment), *Smith*, 258 F.3d at 1177 (defendant's actions not enough to be considered retaliatory action).

As such, because no meaningful difference exists between

the circuits, Petitioners' claim that a split justifies a writ of certiorari is without merit.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this petition for writ of certiorari be denied.

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No. 02-443

IN THE

Supreme Court of the United States

LOUIS FREEH, *et al.*,
Petitioners,

v.

NOTRA TRULOCK, III, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Respondents' Brief in Opposition ("Opp.") underscores the need for the Court to grant certiorari to review the Fourth Circuit's decision in this case. As Respondents have now made clear, even though they assert a claim for First Amendment retaliation, they have nowhere alleged and the lower courts have nowhere found that the Petitioner FBI agents and officials were aware of the allegedly constitutionally protected speech at the time they conducted a search of Respondents' shared home, or that Petitioners' conduct was motivated by an improper motive. To the contrary, as Respondents' submission confirms, the Fourth Circuit reversed the district court's dismissal of Respondents' First Amendment retaliation claim solely on the basis of an "inference" raised by the thinnest reed of circumstantial allegations

contained in the complaint. 275 F.3d 391, 405; Petitioners' Appendix 20a. In so doing, the Fourth Circuit misapplied both the letter and the spirit of this Court's decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998), which requires that a complainant allege *specific, non-conclusory* factual allegations of wrongdoing in motive-based claims against federal officials in their personal capacity, since such claims are "easy to allege and hard to disprove" and carry potentially grave financial and social costs. *Id.* at 585. The district court heeded this Court's admonition; the Court of Appeals did not.

I. RESPONDENTS' BRIEF CONFIRMS THAT THE COURT OF APPEALS PERMITTED THE FIRST AMENDMENT RETALIATION CLAIM TO PROCEED SOLELY ON THE BASIS OF AN "INFERENCE."

Despite Respondents' lip service to the contrary, the Fourth Circuit here sustained Respondents' First Amendment retaliation claim solely on an "inference" of improper motive. That decision squarely conflicts with this Court's holding that such motive-based claims must rest on "specific, non-conclusory factual allegations." *Crawford-El*, 523 U.S. at 598.

While Respondents' brief spends several pages suggesting that the Fourth Circuit's decision rested on six "facts" and not mere inference, *see* Opp. at 6-8, this Court need not tarry in dispensing with this entirely transparent contention. Regardless of how Respondents would now spin it, the Fourth Circuit's opinion expressly states that the First Amendment retaliation claim could proceed because of "a reasonable ***inference*** that the interrogation and search were retaliatory." 275 F.3d at 405; Petitioners' Appendix 20a (emphasis added).[1] The basis for the holding—*i.e.*, that "inference"—

[1] Moreover, not only are the six "facts" noted by Respondents entirely circumstantial (*see* Opp. at 10), but one of the "facts"—*i.e.*, that a criminal

could not be clearer. And, it could not be more clearly incorrect. This Court has made abundantly plain that, given the significant costs and burdens associated with motive-based *Bivens* allegations against federal officials, federal courts must vigilantly apply the Federal Rules of Civil Procedure to weed out suits that fail to allege specific, non-conclusory factual allegations sufficient to sustain a claim. *Crawford-El*, 523 U.S. at 597-98. This is precisely such a suit, and the district court—which is best situated to make such determinations, *see id.* at 600-01—correctly dismissed the action in its entirety.

Respondents' "inference" smoke screen fails to conceal the complaint's ultimate—and fatal—defects. Despite their vague references to the at-issue magazine article's availability in "early July," Respondents have never specifically alleged that the article was available by July 14, the day on which Petitioners Halpin and Carr conducted a search of the home that Respondents shared.[2] Respondents have never alleged

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referral from DOE was a necessary prerequisite to the FBI's investigation of Trulock—is no "fact" at all. As a matter of *law*, no such referral is necessary. 28 U.S.C. § 535. In addition, two more of the "facts" cited by Respondents are immaterial, for they are based on conduct by Lawrence Sanchez—an unrelated third-party. Opp. at 7. The Fourth Circuit clearly could not have rested its decision on any conduct by Sanchez, as Respondents suggest, since the court expressly noted that there is no allegation that Petitioners directed or even were aware of Sanchez's alleged conduct. 275 F.3d at 398; Petitioners' Appendix 12a.

[2] Respondents' only effort to address this pleading deficiency is to meekly argue that "many periodicals are dated after the time that they become available in print." Opp. at 11 n.3. However, Respondents still have yet to identify when copies of the at-issue July 31, 2000 *National Review* actually were available or to allege whether that date preceded the July 14, 2000 search of the home. Respondents certainly never have offered any explanation for how copies of the *National Review*, a weekly periodical, could be "available in print" *seventeen days* before their cover date.

that the FBI or anyone in the agency—including the particular FBI agents and officials named as defendants in this suit—was aware of or had read the article by that date. Likewise, Respondents have never alleged that any of the named defendants here had any improper intent whatsoever when the search was conducted. Indeed, as the Fourth Circuit expressly recognized, the complaint does not even allege any direct involvement at all by three of the five Petitioners. *See* 275 F.3d at 402; Petitioners' Appendix 14a. Nor have Respondents ever alleged (in anything other than a conclusory fashion) that the article was entitled to First Amendment protection. Similarly, Respondents have never suggested that the alleged retaliation impacted Trulock's protected speech in any way or that the search would not have occurred but for the publication of the article. Without these key facts, there simply can be no sustainable claim for retaliation. *See, e.g., Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000) (listing required elements for First Amendment retaliation claim in Fourth Circuit).[3]

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[3] Indeed, Respondents appear to concede the point when citing to a recent Sixth Circuit decision that recognized the Fourth Circuit's decision here as standing for the proposition that mere "circumstantial evidence of improper intent"—*i.e.*, an inference—is sufficient to support a First Amendment retaliation claim. *See* Opp. at 9-10 (citing *Goad v. Mitchell*, 297 F.3d 497, 505 (6th Cir. 2000)). Of course, that proposition is entirely inconsistent with *Crawford-El* and only confirms that the Fourth Circuit's misapplication of this Court's jurisprudence has spawned confusion among the lower courts in how to handle motive-based claims against federal officials in their personal capacities. In fact, at least one other Circuit still applies a heightened pleading standard to motive-based *Bivens* actions, further emphasizing the need for this Court to grant the petition to rectify this continuing confusion. *See Judge v. City of Lowell*, 160 F.3d 67, 73 (1st Cir. 1998); *see also Galbraith v. County of Santa Clara*, No. 00-17369, 2002 U.S. App. LEXIS 21064, at *12-*15 (9th Cir. Oct. 9. 2002) (rejecting *Judge* as "not consistent with *Crawford-El*" (citing *Currier v. Doran*, 242 F.3d 905, 914-17 (10th Cir. 2001); *Gallardo v. DiCarlo*, 203 F. Supp.2d 1160, 1163-64 (C.D. Cal. 2002) ("*Judge* . . .

The district court recognized these fatal flaws in Respondents' complaint when it dismissed the action in its entirety. *See* Petitioners' Appendix 42a. Given Respondent Trulock's ready access to classified information in his capacity as Director of the Offices of Intelligence and Counterintelligence at the Department of Energy, and his subsequent submission of a "personal reflections-type manuscript" based on his experiences in that post, the district court had little trouble concluding that "the complaint presents no indication that the actions by defendants were other than a good faith effort to determine whether classified information was being unlawfully possessed." *Id.* This Court has observed that such judgments by the district courts, which are more experienced in cases involving motive-based allegations against government officials, should be afforded considerable deference. *Crawford-El*, 523 U.S. at 600-01.

Nevertheless, Respondents suggest that this deference extends only to judgments by the district court in "managing discovery" in such cases, and not in "evaluating the legal sufficiency of claims." Opp. at 9. However, here again, Respondents' self-serving interpretation squarely contradicts the plain language they interpret, for this Court expressly has stated that it is the district court's "exercise [of] discretion . . . that protects the substance of the qualified immunity defense." *Crawford-El*, 523 U.S. at 598. Certainly, that

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significantly misreads *Crawford-El*"); *Greenier v. PACE, Local No. 1188*, 201 F. Supp.2d 172, 177 (D. Me. 2002))); *Eaton v. Meneley*, 180 F. Supp.2d 1247, 1252-54 (D. Kan. 2002) (discussing courts' continuing struggles with *Crawford-El* on this point); *Rodriguez-Vazquez v. Cintron-Rodriguez*, 160 F. Supp.2d 204, 208 n.1 (D. P.R. 2001) (citing both *Crawford-El* and *Judge* to support that "[t]he 'heightened pleading standard' is still required for those cases where . . . improper motive . . . constitute[s] an essential element of the . . . claim"); *Goodman v. The President & Trustees of Bowdoin Coll.*, 135 F. Supp.2d 40, 50-52 (D. Me. 2001) (analyzing *Judge*'s reliance on strict language of *Crawford-El*, and attendant propriety of *Judge*'s extension to other civil rights suits).

discretion includes, when necessary, the "complicated analysis of legal issues." *Id.* The Fourth Circuit impermissibly disregarded this directive in substituting its judgment for that of the district court in this action, and the Court should grant the petition to correct this error.

II. RESPONDENTS' BRIEF FAILS TO SALVAGE THE FOURTH CIRCUIT'S MISAPPLICATION OF THE QUALIFIED IMMUNITY DEFENSE.

Not only have Respondents failed to allege sufficient facts to sustain a claim of First Amendment retaliation, but Petitioners further are entitled to qualified immunity for their alleged actions. Indeed, the Fourth Circuit expressly recognized Petitioners' qualified immunity defense in affirming the dismissal of Respondents' Fourth Amendment claims, 275 F.3d at 404; Petitioners' Appendix 17a, but inexplicably disregarded that immunity when permitting the First Amendment claim to go forward. 275 F.3d at 406; Petitioners' Appendix 20a. Respondents vainly attempt to justify the Fourth Circuit's seemingly inconsistent application of the qualified immunity defense, arguing that—even though Petitioners might have thought the at-issue search was permissible, thus affording them qualified immunity on the Fourth Amendment claims—they should have known that the same legally permissible search was undertaken for an impermissible reason, thereby destroying their immunity. *See* Opp. at 12. However, Respondents' argument fails for two principal reasons.

First, the very same conduct is at issue for both the First Amendment and the Fourth Amendment claims. In fact, the First Amendment claim here is dependent on the Fourth Amendment allegations. Accordingly, the same qualified immunity analysis should apply to both. Where the Fourth Circuit concludes that the conduct at issue (*i.e.*, the search and interrogation) is constitutionally permissible under the Fourth Amendment, it cannot be the case that Petitioners

could be liable for a First Amendment violation based on that same conduct. Either the conduct is permissible or it is not. And if the conduct at issue is within legal bounds, then Petitioners enjoy qualified immunity.

Second, Respondents' argument is based entirely on a factual assumption that Respondents have never alleged: namely, that the Petitioner FBI agents had knowledge of the article and a retaliatory motive in conducting the search. *See* Opp. at 11-12. As set forth above, the requisite specific allegations are conspicuously absent from the complaint and from the Fourth Circuit's decision. Quite simply, Respondents have never claimed that Petitioners were aware of, had read, or were otherwise motivated by the article when they conducted the otherwise permissible search of the home shared by Respondents. Accordingly, even under Respondents' theory of the qualified immunity defense, the complaint offers no basis to conclude that Petitioners reasonably knew that they were acting in violation of Respondent Trulock's rights when they conducted a legal search of the home. The Fourth Circuit's denial of qualified immunity therefore was in error, and this Court should grant the petition to correct that mistake.

III. RESPONDENTS' BRIEF MISREPRESENTS THE SPLIT AMONG THE CIRCUITS ON AN IMPORTANT ISSUE OF FEDERAL LAW.

Finally, despite Respondents' vehement denial of a circuit split on the legal issues at the heart of this case, *see* Opp. at 13-14, a truly "thorough reading" of the relevant caselaw reveals a conflict among the circuits on what is necessary to state a cognizable claim for retaliation under the First Amendment—an issue directly implicated by this action. The Court should grant the petition to address the conflict among the lower courts on this important issue of federal constitutional law.

As the Fourth Circuit recognized, this case, like any other presented on a motion to dismiss under Rule 12, necessarily encompasses an examination of the elements of the substantive causes of action involved in the litigation. *See* 275 F.3d at 404; Petitioners' Appendix 18a (citing *Suarez Corp.*, 202 F.3d at 685-86). However, the Fourth Circuit plainly disagrees with its sister circuits on precisely what the elements of that substantive cause of action are. The particular element at issue, as recently stated in *Keenan v. Tejeda*, 290 F.3d 252 (5th Cir. 2002), is that, in order to sustain a claim for First Amendment retaliation, the plaintiff must show "that the defendants' actions caused . . . an injury that would chill a person of ordinary firmness from continuing to engage in that activity." *Id.* at 258; *see also* Opp. at 14. In that case, the Fifth Circuit joined the Fourth Circuit (as well as the First and Second Circuits), in finding that this element involves two distinct inquiries. *Keenan*, 290 F.3d at 259-60; *Suarez Corp.*, 202 F.3d at 685-86; *see also Spear v. Town of West Hartford*, 954 F.2d 63, 67 (2d Cir. 1992); *Sullivan v. Carrick*, 888 F.2d 1, 4 (1st Cir. 1989). First, a court must consider whether the alleged conduct of the defendants would, in fact, "chill a person of ordinary firmness." *Keenan*, 290 F.3d at 258. Second, a plaintiff must "*actually suffer an injury* . . . which, in this context, is the deprivation of a constitutional right." *Id.* at 259 (emphasis added). As Respondents note, these two inquiries may be characterized, respectively, as "objective and subjective factors." Opp. at 15. However, Respondents fail to appreciate that the second, subjective factor is concerned with what *the plaintiff* has done, *not*, as Respondents emphasize, the defendant's alleged actions. *See* Opp. at 15.

Moreover, Respondents fail to appreciate that this subjective factor is unique to the First, Second, Fourth, and Fifth Circuits. Despite articulating their definitions of a First Amendment retaliation claim in similar language, the Sixth, Ninth, or Tenth Circuits have never joined the Fourth Circuit in adopting a "subjective factor." *See Smith v. Plati*, 258 F.3d

1167, 1177 (10th Cir. 2001) ("The focus, of course, is upon whether a person of ordinary firmness would be chilled, *rather than whether the particular plaintiff* is chilled." (emphasis in original omitted) (emphasis in quotation supplied)); *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999) ("[I]t would be unjust to allow a defendant to escape liability . . . because an unusually determined plaintiff persists in his protected activity. . . ."); *Bloch v. Ripar*, 156 F.3d 673, 679-81 (6th Cir. 1998) (plaintiffs' "allegation of injury based on embarrassment, humiliation, and emotional distress," without additional allegation that protected activity was ceased, "is sufficient to be actionable"). Thus, while these Circuits recognize a claim for First Amendment retaliation, regardless of whether the allegedly retaliatory conduct actually impacted the plaintiff, a plaintiff in the First, Second, Fourth, or Fifth Circuits can state a claim only if the allegedly retaliatory conduct *actually stopped* the plaintiff from exercising some right.[4] Therefore, the Circuits apply fundamentally different analyses, potentially resulting in fundamentally different results, to the very same First Amendment claims. This important issue of federal constitutional law cannot depend merely on the geography of the state in which the claim arose. Granting the petition will allow this Court to resolve this conflict.

Furthermore, in an apparent concession, Respondents fail to even address the second circuit split raised by the petition. As Petitioners previously noted, the Circuits are divided on the appropriate manner to address the sufficiency of the

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[4] The thrust of Respondents' argument appears to be that, even though the Sixth, Ninth and Tenth Circuits have failed to articulate a subjective factor as part of their analyses, that factor nevertheless was present in each case Petitioners invoke. *See* Opp. at 15. Of course, whether the subjective factor may or may not have been satisfied in those particular cases does not change the legal standard those decisions actually used—a standard that plainly does not *require* such a finding.

complaint in First Amendment retaliation cases. Specifically, the Fourth and Ninth Circuits hold that "[d]etermining whether a plaintiff's First Amendment rights were adversely affected by retaliatory conduct is a *fact-intensive inquiry* that focuses on the status of the speaker, the status of the retaliator, and the nature of the retaliatory acts." *Suarez Corp.*, 202 F.3d at 686 (emphasis added); *Mendocino County*, 192 F.3d at 1300. In these jurisdictions, courts will look behind the face of a retaliation complaint and are more apt to sustain claims challenged by a motion to dismiss. In contrast, and more consistent with the policy concerns underlying *Crawford-El*, the First and Second Circuits will dismiss those First Amendment retaliation complaints that are "conclusory and speculative, . . . offer[ing] nothing beyond a bare assertion that the [retaliation] caused a chilling effect . . . ." *Spear*, 954 F.2d at 67 (internal quotation omitted); *Sullivan*, 888 F.2d at 4 ("Where a chilling effect is speculative or too remote, finding an abridgment of First Amendment rights is unfounded."). In these Circuits, such complaints "do[] not suffice to defeat a Rule 12(b)(6) motion." *Id.*

Here, of course, the Fourth Circuit's more lenient, "look-beyond-the-complaint" approach is directly at issue, having resulted in a reversal of the district court's dismissal of an otherwise insufficient complaint. This approach quite likely has produced a very different outcome than had the First Amendment claim been brought in the First or Second Circuit. Respondents do not suggest differently or otherwise contest the point. Accordingly, given the undisputed split among the Circuits as to how to approach the sufficiency of a complaint alleging First Amendment retaliation, the Court should grant the petition to clarify this issue of federal constitutional law.

CONCLUSION

The petition for a writ of certiorari should be granted.

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